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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1335

EZRA PARKS,

Petitioner,

v.

SIMPSON TIMBER COMPANY,
a corporation, and
GRACE LINE, INC., a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioner prays that a Writ of Certiorari be issued to review a judgment, entered on November 9, 1966, by the United States Court of Appeals for the Ninth Circuit.

CITATIONS TO OPINIONS BELOW

The Memorandum Opinion of the District Court (R. II, 140-145) is unreported and is printed in Ap-

pendix C hereto, *infra*, p. 65. The original opinion of the Court of Appeals, which was withdrawn by that court and is not a part of the record in this Court,[1] is printed in Appendix B hereto, *infra*, p. 27, and is unofficially reported at 1966 American Maritime Cases 1081. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 1, is reported at 369 F.2d 324, 1966 American Maritime Cases 2704.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1966 (R. I, 36). A timely petition for rehearing was denied on January 6, 1967 (R. I, 40). On timely application, Mr. Justice Douglas, on April 6, 1967, signed an order extending the time for filing this petition for writ of certiorari to and including May 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether, as a matter of federal maritime law, a manufacturer's liability for injuries received aboard a vessel due to negligent manufacturing or packing of its products, is limited to those hazards and risks of which the manufacturer had actual knowledge, or whether the manufacturer's liability also extends to

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[1] After consultation with members of the Court, the Clerk informed counsel for petitioner that, because the original opinion had been replaced, "it is deemed inappropriate to send the original opinion to the Supreme Court," as requested. See fn. 7, App. A, *infra*, p. 10.

those hazards and risks which it could and should have known about in the exercise of reasonable care.

2. Whether the action of a federal court of appeals, in reversing a jury verdict of liability for personal injuries, because of a jury instruction not excepted to at trial, not objected to on appeal, and not affecting one of the defendants at all, deprives the injured party of his right to a jury trial under the Seventh Amendment, and represents such a departure from the accepted course of fair appellate proceedings as to call for the exercise of this Court's supervisory power.

CONSTITUTIONAL PROVISIONS INVOLVED

Seventh Amendment to the Constitution of the United States:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT

Petitioner filed this action against the respondents Simpson Timber Company and Grace Line, Inc., in an Oregon state court. It was removed to the United States District Court for the District of Oregon by both respondents (R. III, 1-14, 17-25) upon the ground of diversity of citizenship. Jurisdiction of the

District Court was based upon the provisions of 28 U.S.C. §§ 1332 and 1441. After removal, Grace and Simpson each cross claimed against the other for indemnity (R. II, 28, 53), and Grace filed a third party complaint against Brady Hamilton Stevedore Company, an Oregon corporation, seeking indemnity (R. II, 35, 89).

Petitioner made timely request for jury trial (R. II, 87). His action against respondents was tried to a jury, and resulted in a verdict and judgment of $80,000.00 against both respondents (R. II, 127, 128). The other three parties stipulated that the issues among themselves would be submitted to the trial court for decision (R. II, 87). Those issues are not involved in this petition.

Petitioner was injured while employed as a longshoreman aboard a merchant vessel owned and operated by Grace. He was loading cargo in an area where doors, manufactured and packaged by Simpson, had already been stowed. The doors were bundled into 42 inch packages, with window openings aligned under one another. The outside doors were covered with corrugated cardboard, so that when the doors were stowed in the anticipated manner, a concealed hole, covered with cardboard, extended from the top to the bottom of the bundle. While petitioner was carrying a sack of flour over the stowed bundles, he fell into the concealed hole in the package, causing him to suffer injury (R. II, 88-90; Pretrial Stipulation).

Petitioner contended (1) that the vessel was un-

seaworthy in that the working surface was unsafe (R. II, 90), and (2) that Simpson was negligent in the manner of packaging the doors for export when it knew, or, in the exercise of reasonable care, should have known, that workmen might be required to walk on them (R. II, 91).

With reference to Simpson, the trial court instructed, in part, as follows:

> "If you find from a preponderance of all of the evidence before you that Simpson Timber Company knew, *or in the exercise of reasonable care should have known* that workmen might walk on said packaged doors, and if you further find that the manner of packaging the doors created a dangerous situation and that a reasonably prudent person under the same or similar circumstances would have supplied some reasonable form of weight bearing support over the hole so that a workman could not step through the cardboard into the hole or would have warned workmen of the danger who might walk on the doors in some manner of the hole underneath the cardboard in some reasonable means, and that the defendant failed to either supply reasonable weight bearing support or some reasonable warning, then such failure, if there was a failure, would be negligence on the part of the Simpson Timber Company." (Emphasis supplied.) (R. IV, 273)

Simpson took no exception to the giving of this instruction (R. IV, 298-299), and Grace took no exceptions to any of the instructions (R. IV, 298).

After verdict, Simpson moved for a judgment not-

withstanding the verdict, new trial or remittitur, on a variety of grounds, which did not include any objection to the foregoing instruction (R. II, 129). Grace moved for a new trial on the sole ground that the verdict was excessive (R. II, 137). These motions were denied (R. II, 140-145, 157; Appendix C, *infra*, p. 65).

Grace and Simpson each appealed, Grace asserting only that the verdict was excessive (R. I, 3). Simpson asserted error in denying its motion for a directed verdict and for judgment notwithstanding the verdict on the ground that a manufacturer of a packaged product is not liable for an injury arising out of the misuse of the packaged product, and that the act of walking on the package of doors constituted a new intervening act. In addition it asked for a reversal for error in denying a motion for mistrial, in failing to grant a new trial on the ground of excessiveness of damages, because of the introduction of certain expert testimony, and because of the failure of the Court to instruct that the packaging of the doors was to protect the doors and not for the purpose of allowing them to be walked on (R. I, 2). No error was asserted with reference to the above quoted instruction.

The case was heard by a panel of the Court of Appeals, and, on December 3, 1965, a decision affirming the judgment below in all particulars was rendered by a divided court (Appendix B, *infra*, p. 27). No reference was made in the opinion or dissent to the above quoted instruction.

Simpson filed a petition for rehearing, asserting that the Court erred in holding the manufacturer liable to a longshoreman for injuries sustained while misusing its product, and in failing to reduce the amount of the judgment (R. I, 8). Grace filed a petition for rehearing "solely on amount of damages" (R. I, 9).

The cause was withdrawn from the original panel and ordered reheard by the court en banc (R. I, 14). After reargument, a 5-4 decision ordered the reversal of the judgment as to both respondents, and the remand of the cause for a new trial (R. I, 17-35; Appendix A, *infra*, p. 1). The cause was reversed as to Simpson because of the emphasized portion of the previously quoted instruction, which the Court incorrectly stated to be one of Simpson's "main points" on appeal (Appendix A, *infra*, p. 4).

The verdict against Grace was reversed, both as to liability and as to the amount of damages, because it "may have been influenced in some degree by considerations which were applied in the light of the erroneous instructions pertaining to the liability of Simpson." (Appendix A, *infra*, pp. 13-14).

A dissent was written by Judge Browning on behalf of himself and three other members of the court.

Petitioner petitioned for a rehearing (R. I, 37), asserting that the Court of Appeals had erred, and had thereby deprived the petitioner of due process of law and the right to a jury trial, as guaranteed by the Fifth and Seventh Amendments to the United

States Constitution, in reversing a jury verdict for the giving of an instruction which was neither excepted to nor asserted as error on appeal, which did not affect the liability of Grace, and as to which petitioner never had an opportunity to be heard. The petition was denied without opinion (R. I, 40).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has here outlawed a tort principle approved by this Court in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 210-211,[2] and utilized in virtually every tort proceeding in the federal and state courts. It has outlawed the concept that liability may be premised, as the jury was here instructed, on a finding that the defendant knew "or in the exercise of reasonable care should have known" of the hazard in question.

By reading into that concept the implication that the defendant manufacturer has an affirmative legal duty to make inquiry as to how its products are handled, the Ninth Circuit has sought to create problems far beyond those normally associated with the instruction in issue. And in attempting to avoid those implied problems, the court below has succeeded only in creating a narrow and unrealistic standard of liability, limited to known hazards and freeing the defendant of all responsibility for that which it reasonably should have known and avoided.

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[2] In the *Gutierrez* case this Court affirmed the trial court's finding that the respondent was negligent in that "it knew or should have known that injury was likely to result" from the hazardous condition created by it.

The decision below represents an important, novel and highly dubious development in federal maritime law. It was rendered by a closely and irreconcilably divided *en banc* court, a tribunal long experienced and respected in maritime matters. And it is and obviously was meant to be a definitive delineation of the extent of the tort liability of manufacturers whose products are used and handled aboard vessels, causing injuries to longshoremen and others.

The Ninth Circuit's resolution of this significant and recurring problem, however, is so contrary to modern tort concepts and represents so total a retreat to Nineteenth Century notions of products liability as to warrant a full review and exploration of the issue by this Court. The decision below—unless corrected by this Court—will stand as a dangerous and troublesome precedent, plaguing all future maritime tort litigation of this nature. In addition, the procedural unfairness accompanying the appellate reversal of the jury's verdict in this instance justifies the exercise of this Court's supervisory authority.

I

The decision below is in conflict with the decisions of this Court and of other appellate courts relative to the imposition of tort liability for hazards which should have been known in the exercise of reasonable care.

Since the injury here suffered by petitioner occurred aboard a ship upon navigable waters, any dec-

laration of the resulting rights and liabilities is necessarily a declaration of federal maritime law.[3]

Thus, when the Ninth Circuit here declared that a manufacturer is responsible only for known hazards with respect to the packing and handling of its products stowed aboard a vessel, and has no legal duty as to other possible hazards about which it should know, the court was enunciating a tort principle of federal maritime proportions.

As epitomized by the dissent of Circuit Judge Browning, the majority of the Ninth Circuit has held that

> ". . . a manufacturer is required to guard against only those risks which it actually knows. The more limited the manufacturer's knowledge, the less onerous its duty. Ignorance, no matter how unjustified, affords a complete defense to a charge of negligence in the ordinary case."

Such an extreme rule, however, is completely contradicted by the host of decisions dealing with tort concepts in general and with manufacturers' liability in particular. Indeed, the idea that a person, including a manufacturer, must be responsible not only for what he knows to be hazardous, but for what he should know in the exercise of reasonable care, lies

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[3] Where injury occurs aboard a vessel on navigable waters, "The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law." *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959). See also *Workman* v. *Mayor, etc., of New York*, 179 U.S. 552, 557-564 (1900).

at the cornerstone of modern tort law. "The very concept of negligence presupposes that the actor either does foresee an unreasonable risk of injury, *or could foresee it if he conducted himself as a reasonably prudent man.*" 2 Harper & James, The Law of Torts, § 16.5, p. 907 (1956), emphasis added.

Thus, as stated in *Nisbet* v. *Van Tuyl*, 241 F.2d 874 (C.A. 7, 1957):

> ". . . one under a duty to use care for which knowledge is necessary cannot escape liability for negligence because of voluntary ignorance,"

because, as the court said in *Mattson* v. *Central Electric & Gas Co.*, 174 F.2d 215, 220 (C.A. 8, 1949), cert. den., 338 U.S. 868; reh. den., 338 U.S. 896:

> "While the foundation of liability for negligence is knowledge, in law an opportunity by the exercise of reasonable diligence to acquire knowledge is equivalent to knowedge, and one under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance."

The concept of constructive notice, which the Ninth Circuit has found not to be a ground for manufacturer's liability, is so basic as to be part of the very fabric of the law of torts. This Court has declared many times that negligence is a relative concept, dependent "upon whether there was an absence of the care which it was the duty to exercise under the particular circumstances." *Workman* v. *Mayor, etc., of New York*, 179 U.S. 552, 571

(1900); see also *Grand Trunk R. Co.* v. *Ives*, 144 U.S. 408, 416 (1892); *Stone* v. *New York, C. & St. L. R. Co.*, 344 U.S. 407, 409 (1953) ("The question [as to negligence] is what a reasonable and prudent person would have done under the circumstances.") As stated in *Davidson Steamship Co.* v. *United States*, 205 U.S. 187, 194 (1907), under certain circumstances a person's

> ". . . very want of knowledge, when he had the means of ascertaining the facts, could properly be regarded as negligence. Clearly, it could not be held as matter of law not to be so."

Yet the Ninth Circuit has here declared that, as an inexorable matter of federal maritime law, a manufacturer's lack of knowledge cannot give rise to negligence or liability.[4] That holding cannot be reconciled with the aforementioned decisions of this Court.

The opinion. moreover, is in diametric conflict with such federal maritime decisions as:

(1) *Sieracki* v. *Seas Shipping Co.*, 149 F.2d 98, 99-100 (C.A. 3, 1945), aff'd. 328 U.S. 85 (1946), where the Third Circuit held the manufacturer of a vessel liable to a longshoreman injured by the breaking of a shackle. The manufacturer had failed to make tests which could and should have been made. In other words, the manufacturer was held

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[4] The only exceptions suggested by the majority opinion of the Ninth Circuit are where the product is inherently dangerous or harmful and where the hazard "is so obvious as to permit of no doubt that one could have anticipated it."

liable for what, in the exercise of reasonable care, it should have known—which is precisely what the Ninth Circuit has here held to constitute error.

(2) *Whorton* v. *T. A. Loving & Company*, 344 F.2d 739 (C.A. 4, 1965), where the Fourth Circuit held a bridge contractor liable for failure to discover and remove an underwater piling. There, too, the contractor, whose liability was assimilated to that of a manufacturer, was held liable for what it should have known in the exercise of reasonable care.

(3) *McKee* v. *Brunswick Corporation*, 354 F.2d 577 (C.A. 7, 1965) where the Seventh Circuit held a boat manufacturer liable for failure to discover defects which could have been discovered by the exercise of reasonable care.

In addition to the direct conflicts with other federal maritime decisions, the decision, as noted, is in conflict with virtually the entire body of the law of torts, and particularly the law of manufacturer's liability, as laid down by the state courts and the federal Courts of Appeals in diversity cases. While any number of examples could be given, the following are illustrative:

(1) *Mazzi* v. *Greenlee Tool Co.*, 320 F.2d 821 (C.A. 2, 1963), where the Second Circuit held it error to direct a verdict in favor of a manufacturer if the evidence was such that a jury could reasonably find that the use of a particular component part of the product was intended by the manufacturer or was reasonably foreseeable, so that failure to warn

of the danger involved in such usage constituted negligence. As Circuit Judge Browning noted in his dissent below, the holding of the Ninth Circuit majority in this case "is irreconcilable with the decision in *Mazzi*."

(2) *Butler* v. *L. Sonneborn Sons, Inc.*, 296 F.2d 623, 625-626 (C.A. 2, 1961), where the Second Circuit held:

> "True, a manufacturer of an ordinarily safe article is not held to that degree of clairvoyance which hindsight alone can give. But, especially when injury is likely to be serious if trouble occurs, even slight foreseeability may warrant, and a long history of good fortune will not necessarily exclude, a conclusion by the trier of the facts that prudence requires the manufacturer to take on so small an added burden."

(3) *Spruill* v. *Boyle-Midway, Incorporated*, 308 F.2d 79, 83 (C.A. 4, 1962), where the Fourth Circuit stated that the doctrine restricting liability to injuries received from the "intended use" of a manufacturer's product "is but a convenient adaptation of the basic test of 'reasonable foreseeability' framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence."

(4) *Roberts* v. *United States*, 316 F.2d 489, 495 (C.A. 3, 1963), where the Third Circuit held that a manufacturer could be subject to liability, even though it could not have foreseen the very injury which occurred or the manner in which it occurred,

if "it knew or should have known that some injury might occur."

(5) *Guffie* v. *Erie Strayer Company*, 350 F.2d 378, 381 (C.A. 3, 1965), where the Third Circuit, in discussing the duty of a manufacturer, held:

> "What is reasonable care must in turn be decided in the light of what was reasonably foreseeable at the time the product's design was put in use. While a manufacturer is not required to be clairvoyant, he is rightly held to the standard of an expert in regard to his own product. Foreseeability, of course, does not require that one must foresee the precise hazard or envisage the harm in the detailed manner in which it occurred; it is enough if some harm of a like general character is foreseeable."

(6) *Ford Motor Company* v. *Mathis*, 322 F.2d 267, 274 (C.A. 5, 1963), where the Fifth Circuit held a manufacturer "liable to those within the foreseeable zone of danger for harm caused by the failure to exercise reasonable care . . ."

(7) *Bathory* v. *Proctor & Gamble Distributing Company*, 306 F.2d 22, 29 (C.A. 6, 1962), where the Sixth Circuit held that it was for the jury to decide, as the trial judge charged, whether a distributor "knew or should have known that its product, if used as directed or recommended by it, would cause or be likely to cause such (plaintiff's) injury."

(8) *Land O'Lakes Creameries, Inc.* v. *Hungerholt*, 319 F.2d 352, 359 (C.A. 8, 1963), where the Eighth Circuit held that a manufacturer of a prod-

uct was liable to persons "who may reasonably be expected to be in the vicinity of its probable use for injuries arising from his negligence in the manufacture or containment of the product."

Even such decisions as *McCready* v. *United Iron and Steel Company*, 272 F.2d 700 (C.A. 10, 1959), and *Cohagan* v. *Laclede Steel Company*, 317 S.W. 2d 452 (Mo., 1958), cited by the majority opinion below, held merely that the evidence in those particular cases was insufficient to charge the manufacturer with knowledge of the risk in question. Neither court held, as the Ninth Circuit majority has here held, that evidence of actual knowledge is required before liability can attach to a manufacturer.

Indeed, the Ninth Circuit's assumption that the "should have known" standard carries with it the imposition on the manufacturer of a "legal duty to make inquiry as to the working practice of those who might handle its product" deserves most careful consideration. It is an assumption not dictated by the terms of the standard and can scarcely serve as a reason for confining a manufacturer's liability to known hazards. Even if the assumption be accepted, is not the imposition of such a legal duty consistent with the developing law of manufacturer's liability? See Note, 66 Columbia L. Rev. 1190 (1966), and Judge Browning's discussion, speaking only for himself, of the duty of a manufacturer to inform itself. *Infra*, Appendix A, pp. 25-26, n. 13.

These problems make it appropriate that review be granted in this case. And it is important that this gross inconsistency in opinions be resolved. The Ninth Circuit's new and controversial rule has implications in the development of federal maritime law far beyond the determination of liability in this particular case. If the rule here enunciated be followed, manufacturers can escape liability for all but known hazards and the injured party will be remediless in situations where a warranty of seaworthiness does not apply, or where the ship owner is insolvent or otherwise entitled to limit his liability, or where the damage does not involve a ship. Such situations can and do frequently arise: (1) In actions for wrongful death of a seaman, (2) actions by a passenger or guest aboard a vessel, (3) actions by a longshoreman or repairman injured aboard a "dead" ship, (4) actions by a workman injured aboard a ship while not doing the traditional work of a seaman, (5) actions by a workman aboard an oil rig or other stationary structure in navigable waters, (6) actions by passengers, guests or crew aboard an aircraft over navigable waters, (7) actions by United States employees or servicemen, foreclosed from suing the vessel owner, (8) actions against contractors or manufacturers of components used in bridges, dams, piers or other maritime installations, (9) indemnity actions by ship owners who are liable without fault to workmen or cargo, and (10) actions where the ship or boat owner may limit its liability under the provisions of 46 U.S.C. § 181 *et seq.*

This Court has emphasized that harsh rules of common law liability are incompatible with admiralty practice, *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 408-409 (1953), and that subtle distinctions between classifications of liability are foreign to admiralty's tradition of simplicity and practicality. *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 630-631 (1959). Moreover, in *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 322-324 (1964) this Court laid down the rule that liability would be imposed, even without fault, on the one who "was in a far better position than the ship owner to avoid the accident," because "liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury."

It would be anomalous indeed if the notably favorable maritime law climate of decision for the claims of injured workmen should fall so far behind the developing law of manufacturer's liability in state courts. For this reason, it is important to know if the Ninth Circuit declaration that manufacturer's liability extends only to known hazards is a definitive rule of federal maritime law, or whether the maritime law of negligence is in accord with the policy and rules of law laid down by this Court, and as stated by the other circuits.

II

The action of the Ninth Circuit in reversing the jury verdict on the basis of an instruction not excepted to nor objected to on appeal denied petitioner his right to a jury trial and is contrary to the principles established in Hormel v. Helvering, 312 U.S. 522.

The decision below embodies a most significant problem in the fair administration of the federal appellate system. In reversing the jury's verdict and remanding the case for a new trial as to the manufacturer's actual knowledge of the defect in packing and stowing its products, the majority of the Ninth Circuit premised its action upon a portion of the trial judge's instruction to the jury as to which no exception was taken and no error was claimed on appeal or petition for rehearing by any party. The majority's statement that this instruction—which permitted the jury to find negligence if Simpson "in the exercise of reasonable care should have known" of the defect—was one of Simpson's "main points" on appeal is belied by an examination of the points actually raised in Simpson's appeal (R. I, 2). The major point asserted on the appeal was the claim that the trial court erred in denying Simpson's motions for directed verdict and judgment n.o.v. "since the evidence clearly indicated no actual negligence on the part of Simpson to Parks and that Simpson owed no duty to Parks." The challenged instruction—far from being a "main point"—was never asserted as error at all.

Moreover, the trial record discloses that this critical instruction was completely consistent with Simpson's own requested instructions; six of those requests embodied, in some particular, the concept of constructive notice (R. II, 105, 106, 115, 120, 124, 125). As part of the same instruction held by the Ninth Circuit to be reversible error, the trial court instructed that Simpson was under a duty to exercise reasonable care to make the package reasonably safe for handling in the course of shipment "as Simpson Timber Company might reasonably be charged with in anticipation of the fact that the goods would flow in commerce" (R. IV, 273). This language was adapted from Simpson's own request No. XXI (R. II, 24). The trial judge, in fact, noted that he was following Simpson's requested instructions "almost verbatim" (R. IV, 259). And nowhere did Simpson even suggest an objection to any portion of the instruction as given.

As Circuit Judge Browning has further noted, the instruction as to the liability of Simpson, even if erroneous, could have no conceivable effect upon the liability of the shipowner, Grace. In fact, Grace had not sought on its appeal any reversal of the jury determination as to its liability and had taken no exception to any instruction. Yet the majority of the Ninth Circuit proceeded to set aside the verdict as to Grace, ignoring the fact that its appeal had been limited to the question of the alleged excessiveness of the verdict.

It was taken for granted by all the parties, as well as the trial judge, that the doctrine of constructive notice applied to the manufacturer's liability. It was also taken for granted by all parties on appeal. In the original opinions, including the dissent by Judge Ely, it was not even suggested that this instruction was either involved in the appeal, or erroneous. No one doubted that the rule of constructive notice applied; the issue was whether there was evidence sufficient to justify the application of the rule. It was not until after the *en banc* hearing, when the majority opinion held that the instruction was erroneous, that the correctness of this instruction was ever questioned.

Such action by the Ninth Circuit served to deprive petitioner of his right to a jury trial, as guaranteed by the Seventh Amendment, undisturbed by afterthoughts of an appellate court as to matters not brought before it. Indeed, this action is directly contrary to the proposition established by this Court in *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941):

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon

which they have had no opportunity to introduce evidence."

The use of that proposition to limit appellate review to issues actually raised in the trial court and pursued on appeal would seem particularly relevant where a jury trial has been had and a jury verdict rendered. Whatever exceptions there may be to the proposition, such as those embodied in the plain error rule,[5] the action of an appellate court in going outside the issues raised by the litigants in order to establish an entirely new and unanticipated tort principle would seem highly questionable. If appellate courts are now free to follow the Ninth Circuit's leadership in discoursing upon issues not raised below or on appeal, the dimensions and implications of that practice deserve the most careful consideration by this Court.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN.
Attorney for Petitioner

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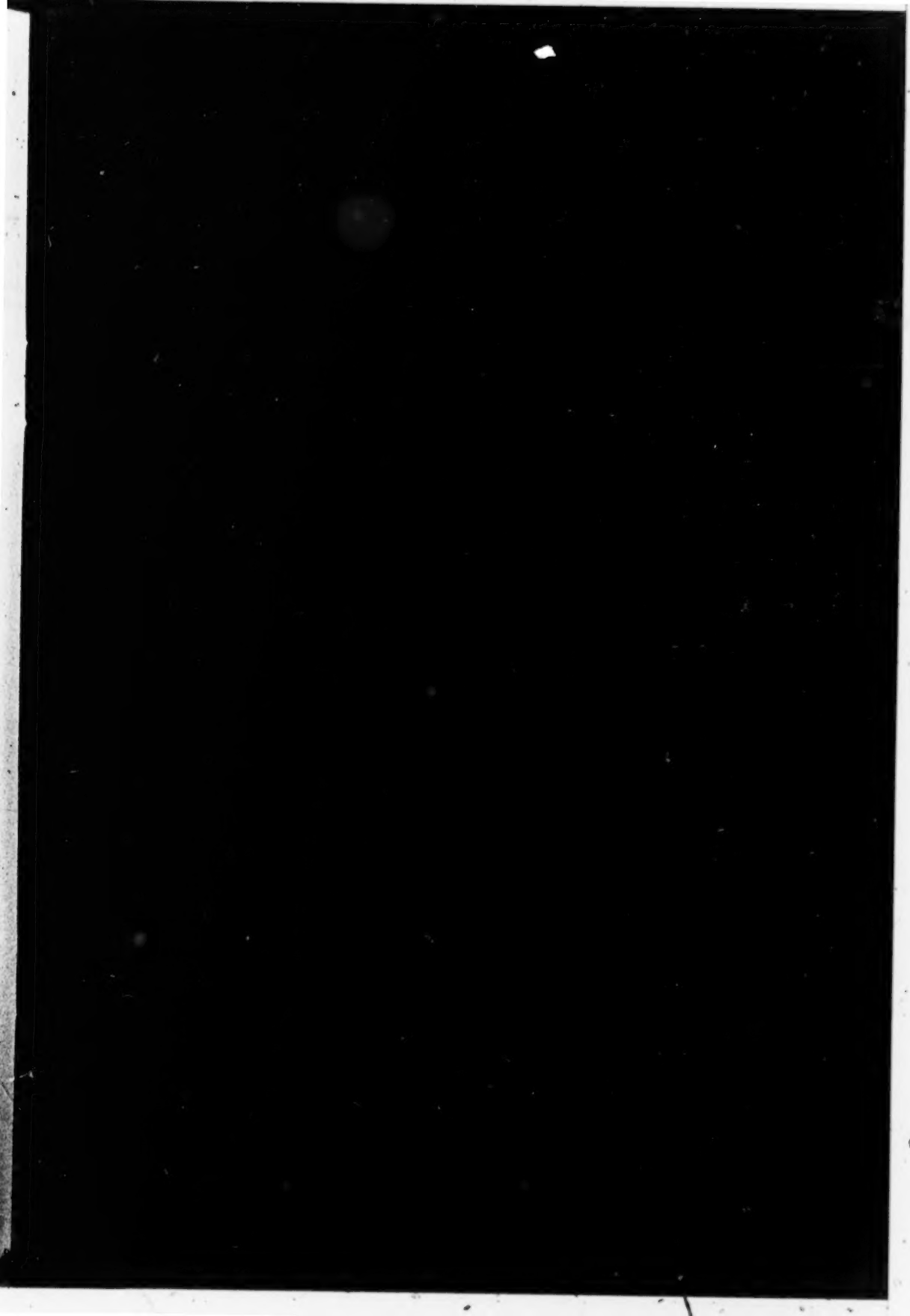
[5] A rule which is not followed in the Ninth Circuit in civil cases. See e.g., *Crespo* v. *Fireman's Fund Indemnity Company*, 318 F.2d 174, 175 (C.A. 9, 1963).



APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIMPSON TIMBER CO. and GRACE LINE, INC.,
Appellants,
v.
EZRA PARKS,
Appellee.
No. 19,673

SIMPSON TIMBER CO.,
Appellant,
v.
GRACE LINE, INC., et al.,
Appellees.

[November 9, 1966]

Appeal from the United States District Court for the District of Oregon

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Before: CHAMBERS, BARNES, HAMLEY, JERTBERG, MERRILL, KOELSCH, BROWNING, DUNIWAY, and ELY, Circuit Judges

ELY, Circuit Judge:

A longshoreman stowing cargo was injured when he stepped through the packaging on a bundle of doors. The Simpson Timber Company manufactured the doors. In filling an order for an exporter it was required to package the doors for shipment overseas. The doors were cut to leave openings for glass. The manufacturer packaged the doors in a stack forty-two inches high, with the window openings

aligned so that a well was formed. A cardboard cover was wrapped around the center of the stack leaving the solid edges of the doors exposed but concealing the interior cavity. The cardboard-bound stack was then bound with two steel straps and wooden chocks fastened along one side to permit the stack to be handled by a forklift tractor. The completed bundle appeared to consist of solid wooden doors wrapped in a protective cardboard cover. When the bundle rested on its chocks the concealed well created by the window openings extended vertically through the package from top to bottom. The manufacturer gave no warning that the cardboard cover concealed a well, by notice on the package or otherwise. Printing on the package identified the contents as "fine doors," and stated that the cardboard cover was not to be removed until the doors were unpacked for installation.[1] Simpson delivered the doors to the dock for the exporter. The exporter, who was in fact the shipper here, arranged that Grace Lines, Inc., convey the doors overseas in one of its ships, and the shipowner made a contract with an experienced stevedoring company for the loading of the ship's cargo. Longshoreman Parks was employed by the stevedoring company. The bundles were loaded without incident until the top-most layer was sought to be placed in the square of the hatch. Dunnage was not placed upon

[1] This method of packaging doors for export had been used by Simpson in its prior overseas shipments of many thousands of doors. There is no record of an injury having been sustained by one participating in the transport of such a shipment prior to that sustained by Parks.

the bundles of doors. Since the bundles did not precisely and firmly fit within the square, the expert loaders chose to stabilize the top-most layer by placing sacks of flour between the bundles. In furtherance of this decision, Parks stepped upon the bundle carrying a sack of flour weighing one-hundred pounds. The cardboard did not withstand the weight, and the forty-two inch fall resulted.

The longshoreman filed an action in the Oregon state court. The shipowner and Simpson were named as defendants. Upon petition by both defendants, the action was removed to the District Court (28 U.S.C. § 1441), where jurisdiction rested on the basis of diversity of citizenship and the requisite amount in controversy. 28 U.S.C. § 1332. The shipowner interpleaded the stevedoring company (the longshoreman's employer) as a third party defendant. Each of the three defendants made claims against the other. The main action was tried before a jury, it having been agreed that the indemnity claims would be determined by the judge following the jury verdict. The jury returned a verdict against Simpson and the shipowner. The district judge granted the shipowner indemnity from Simpson and denied Simpson indemnity from the stevedoring company. Simpson and the shipowner appeal. Our court derives its jurisdiction from 28 U.S.C. § 1291.

A panel of our court heard this appeal and affirmed the trial court. One of the panel dissented.[2]

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[2] See first sentence footnote 7, *infra*.

A petition for rehearing was granted, and the court determined that the appeal should be heard en banc.

There are three contentions which have commanded our principal attention. Both Simpson and the shipowner urge that the verdict and judgment award excessive damages to Parks.[3] Simpson presents two other main points, (1) that the district judge erred in denying its motion for a mistrial,[4] and (2) that an instruction given to the jury was prejudicially erroneous as to it.

The majority here holds that Simpson's point (2) is well taken and requires reversal. Since, upon remand, there must be a retrial, there is no need to review the contentions as to events which may not reoccur.

After the evidence had been given, Simpson moved for a directed verdict in its favor. It argued that it was under no legal duty to conduct inquiry as to stresses to which its package would be subjected because of stevedoring practices of which it had no knowledge. It reaffirmed its position in objecting to an instruction given to the jury as follows:

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[3] Parks was not hospitalized as a result of his injuries. The total medical expense for his treatment was $76.25. He was awarded damages of $80,000.

[4] In his opening statement at the beginning of the trial, Parks' attorney told the jury, in effect, that following the accident, Simpson had improved its manner of packaging doors. Simpson immediately moved that the court declare a mistrial. The district judge later commented as to this point, "So I will have to take that chance with the consolation that if it is reversed on that basis, it wasn't my fault."

"If you find from a preponderance of all of the evidence before you that Simpson Timber Company knew, *or in the exercise of reasonable care should have known* that workmen might walk on said packaged doors, and if you further find that the manner of packaging the doors created a dangerous situation and that a reasonably prudent person under the same or similar circumstances would have supplied some reasonable form of weight bearing support over the hole so that a workman could not step through the cardboard into the hole or would have warned workmen of the danger who might walk on the doors in some manner of the hole underneath the cardboard in some reasonable means, and that the defendant failed either to supply reasonable weight bearing support or some reasonable warning, then such failure, if there was a failure, would be negligence on the part of the Simpson Timber Company." (Emphasis supplied.)

It is this instruction which the majority determines to have been erroneous. Under the facts as they appear, it embraced a principle which we cannot accept.

The instruction permitted the imposition of liability upon Simpson if the jury should determine that Simpson, before it delivered its doors to the dock, *knew* of the stevedores' practice of walking upon packages of cargo. This was proper. Used as a floor, or walking surface, the bundle of doors was a trap. If Simpson

delivered the bundle with knowledge that it would likely be walked upon, then it might reasonably be held negligently to have breached a duty to the stevedores, including Parks. Simpson vigorously urges that there was insufficient evidence to support a finding that it had prior knowledge of the working practice. Upon careful review of the record, the majority concludes that Simpson's position in this respect is not well taken. It was shown Simpson had a plant in the City of Portland and a warehouse in the waterfront area. For years Simpson had annually shipped 16,000 to 18,000 doors overseas (less than four percent of its volume), and its plant manager visited the warehouse an average of once every week or ten days. The plant manager testified that he had been on the dock and seen the holds of ships, and that he had "wondered" how cargo was moved to portions of the hold away from the hatches. From these circumstances, with reasonable inferences which might be drawn therefrom, the trier of facts could, in the majority's opinion, find sufficient basis for a determination that Simpson did, in fact, have knowledge of what is said to be the common working practice of longshoremen engaged in the stowing of cargo.

The instruction, however, also authorized the fixing of liability upon Simpson if the jury should determine that Simpson "in the exercise of reasonable care should have known that workmen might walk on said packaged doors, . . ." Implicit in the instruction is the principle, believed by our majority to be incorrect, that Simpson had the legal duty to make

inquiry as to the working practice of those who might handle its product.

If a common stevedoring practice exists in a particular port, no difficulty should be encountered in learning of it. If a manufacturer or shipper is obliged to be aware of it and is not, it would hardly seem possible that he could successfully maintain that he exercised reasonable care.

Our problem, then, is generally concerned with the extent of the duty which rested upon Simpson, as manufacturer and packager, as to those whom it might reasonably expect would handle its product in the course of exportation. Put another way, to affirm the judgment as against Simpson would require affirmative answer to the question, may the manufacturer and packager of an article which is not inherently dangerous be justly held liable to a longshoreman who sustained injury, while loading the package aboard a vessel, as a result of using the package for a peculiar purpose not intended, anticipated, or known to the manufacturer?

An affirmative answer would, in turn, establish a principle, too far-reaching and onerous in application, that one who packs an item for shipment is burdened with a legal duty to ascertain the customary working practices of stevedores in any port which the purchaser, a shipper, or transporter might select for loading and embarkation. Acceptance of this proposition would require unprecedented extension of doctrines which impose liability upon manufacturers and

a departure from those recognized tort rules which require no more than that a manufacturer packing his goods for shipment shall exercise ordinary care to eliminate hazards which are known[5] to him.

There is no authority which the majority is able to interpret as affording precedent for the imposition of the extended duty which was applied against Simpson in the case at hand. Long established and especial principles are justly applicable in so-called products liability cases wherein the product is inherently dangerous or harmful. These principles are sound, but they cannot be appropriately applied to a case wherein the product is such an ordinarily harmless item as a package of doors, a product which cannot explode, ignite, strike, poison or cause skin diseases and which, without doubt, was not intended to be used, ultimately or at any time, as a floorway.

There is only one case in which the facts are closely analogous to these which meet us here. That case is *McCready* v. *United Iron & Steel Co.*, 272 F.2d 700 (10th Cir. 1959). There, the defendant was a manufacturer of steel window casements. While a casement was being placed into a building under construction, an iron-worker, while shortening the outside flanges of the casement, used its crossbars as handholds and footrests. One of the crossbars did not withstand the stress, and the workman fell to his

[5] If a hazard is so obvious as to permit of no doubt that one could have anticipated it, then he may be held to the same responsibility that rests upon one to whom the hazard is "known." See 54 Geo. L.J. 1439, 1441 & n.9 (1966).

death. It was proved that in the construction of buildings, iron-workers customarily and commonly ascended and descended casements by using the casements' steel crossbars as handholds and footrests; nevertheless, the court held, properly in our opinion, that the manufacturer was not liable. Said the Court of Appeals, "A manufacturer may assume that his product will be devoted to its normal use. And if it is safe when devoted to the normal use for which it was manufactured, he is not liable for damages for injury resulting from an abnormal or unusual use not reasonably anticipated." *McCready* v. *United Iron & Steel Co., supra,* 272 F.2d at 703. (Citations omitted.)

The product was intended for use as a window, not as a ladder. The manufacturer was not under a legal duty to investigate all customs, however universal, of construction workers who might participate in the erection of buildings where the window casements might be installed. He had no duty to follow his product through every avenue to its ultimate intended use. The principle of *McCready* is a sensible principle, soundly based upon traditional concepts of legal duty. Its reasoning guides to the determination here.

One other case deserves comment. It is *Cohagan* v. *Laclede Steel Co.*, 317 S.W.2d 452 (Mo. 1958), wherein the defendant steel manufacturer had packed steel strips in bundles which were wrapped in three places with steel wire. At their destination, the bundles were unloaded by the use of a crane. On the crane's cables were hooks which were placed under the two steel wire wrappings at the ends of the bundle to be lifted.

While one of the bundles was being lifted from a trailer on which it had been transported to the consignee, the wire wrapping at one end of the bundle broke. There was evidence of a practice to lift bundles by attaching a crane's cable hooks to the steel wire wrappings as there was evidence here of the custom and practice of using packages as walkways. The court held that the manufacturer was not liable to the consignee's injured workman. Missouri's Supreme Court remarked, "Thus the initial requirement of the rule [as to manufacturer's liability] is that the use being made of an article or product must be the purpose for which it was manufactured or, as stated in [McLeod v. Linde Air Prods. Co., 318 Mo. 397, 1 S.W.2d 122 (1927)], the application being made of the thing must be its intended use." 317 S.W.2d at 454. The court went on to emphasize that "the primary purpose of the wire binder was to hold together * * * pieces of steel in a bundle." 317 S.W.2d at 454. Here, the primary purpose of Simpson's wrapper, marked "fine doors," was "to hold [the doors] together," and to protect them from damage. If Simpson had no prior knowledge of the stevedoring practice, then it no more intended or anticipated that the bundle of doors would be put to use as a floor, to withstand any weight, however heavy, than did the manufacturer in *McCready* intend or anticipate that the casement would be used as a ladder or the manufacturer in *Cohagan* that the binders would be used as a lifting attachment.[6]

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[6] We have recognized that when "Used as a floor, or walking surface, the bundle of doors was a trap" (*supra*, page 4),

There is no force of legal reason or of social consideration which compels departure from traditional concepts and the teaching of *McCready* and *Cohagan*.[7]

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but the intended use of the package was to provide a covering that would protect the goods from damage and not to provide a floor or walkway for longshoremen. Any manufactured article, if wrapped in a manner too fragile to withstand an unintended use to which it may be subjected by reason of peculiar practice unknown to the packager, might become a trap. Here, the bundle of doors was a trap only because the bundle was being subjected to a use for which it was not designed or intended, a use arising solely from a stevedoring practice about which, the jury was instructed, the manufacturer was obliged to learn. If the doors' wrapper had been of sufficient strength to survive the weight of an ordinary man and if Simpson had made inquiry and ascertained the stevedores' practice of walking upon packages of cargo, would it also have been required to anticipate that a workman would walk upon the package while carrying a hundred-pound sack of flour or any other burden, of whatever weight, which might be chosen, in the instant, to pack and stabilize the packages in the square of the hatch? Would the manufacturer have the legal duty to anticipate that three or four or five longshoremen might walk or stand upon his package at the same time? Since in our case there is no evidence of stevedoring custom or practice to impose a particular weight upon packages being used as floors, we are asked, in effect, to apply a rule requiring that the manufacturer insure that his product be packaged in anticipation of whatever use to which it may be subjected by stevedores loading it as a part of a ship's cargo.

[7] The majority and dissenting opinions of our original panel, although withheld from publication in the Federal Reporter, appeared in 1966 A.M.C. 1081. In slip form, they also came to the attention of others. See 66 Colum. L. Rev. 1190 (1966) and 54 Geo. L.J. 1439 (1966). The writer of the Columbia Law Review treatment would justify a requirement that the manufacturer take steps to learn of stevedoring practices upon the assumption that the manufacturer "can better spread the risk of loss."

On the other hand, the writer of the casenote in the Georgetown Law Journal observes, as to such a requirement, "Consideration of the number of persons who handle goods in commerce, their varying practices, and the distances goods are shipped indicates the enormity of this obligation." 54 Geo. L.J. at 1445. And, after reasoning that the burden of ascertaining the workmen's practices should justly fall on the stevedoring

When a duty rests upon a manufacturer because of his knowledge of a working practice like that which was followed here, he might quite easily fulfill it. A simple warning would ordinarily suffice. When, however, his shipment is to be entrusted to expert loaders and expert carriers, it hardly fits fair standards to say that there should rest upon him the burden to anticipate every course which the product is to follow and to acquire knowledge, in advance, as to the uses to which his product will be subjected by reason of working practices, perhaps unique, or even strange, of those who are to handle it.[8]

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company, the writer concludes, "A blanket application of the . . . duty . . . would impose a heavy, perhaps intolerable, burden on the manufacturer or packer." 54 Geo. L.J. at 1446.

[8] Let us suppose that a manufacturer packages fine glassware and sells it to an exporter who chooses a certain port as the place for export. If it should be the practice of longshoremen of that port to walk barefooted on packages being loaded as a ship's cargo, should a longshoreman who, following the practice, cuts his foot upon the contents of the crushed package recover against the manufacturer who was truly ignorant but might have learned, by inquiry, of the practice?

The imposition upon manufacturers of such a burden, in terms of the time and resources which would be demanded, would, we agree, be "intolerable." The majority will not impose it. We do not believe that, as a consequence of our decision, manufacturers will remain deliberately ignorant of the practices of handlers with injuries to the handlers as a result. The almost total dearth of cases involving similar situations is an indication that longshoremen and other handlers have not been exposed to countless dangers caused by methods of packaging which fail to take into account the handlers' unusual working practices. The manufacturers' own self-interest in the product's arrival at its destination in an undamaged condition serves as some safeguard against injuries caused by practices of handlers which are unknown to the manufacturer. It is only in a rare case, such as the one at bar, that a longshoreman might be injured while practicing a custom unknown to the manufacturer. Even in this case, the question is not necessarily whether recovery can be had, but from whom. And

Since it is not possible to determine which of the two principles contained within the questioned instruction was applied by the jury, and since one of the included principles was erroneous, the judgment against Simpson cannot stand. See *Davis* v. *Patrick*, 122 U.S. 138, 154, 30 L. Ed. 1090, 7 Sup. Ct. 1102 (1887).

There must also be a reversal as to the judgments affecting the conflicting claims for indemnification. The liability of Grace Lines to Parks was fixed by the jury upon the determination under the instructions that its vessel was unseaworthy. The reaching of the verdict in such respect, both as to liability and as to the amount of damages, may have been influenced in some degree by considerations which were applied in

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the benefit that would accrue to the injured few cannot off-set the burden which the challenged principle would impose upon the many.

In general the rationale for recent extensions in the liability of manufacturers has been that "more and more complicated products with potentiality for harm if not properly used are being sold to relatively inexperienced laymen." 1 Frumer & Friedman, Products Liability § 8.01, p. 145 (1960). This rationale is inapplicable to our case. We agree that a handler should recover for an injury for which an ultimate intended user could recover if it would be reasonable for him to use the products in a same or similar manner. This principle was applied in *Land O'Lakes Creameries, Inc.* v. *Hungerholt*, 319 F.2d 352 (8th Cir. 1963). That case involved a product containing an imminently dangerous substance. A person delivering the product was allowed to recover for injuries sustained as a result of some of the substance leaking out of the container and into his shoe. We would also advocate recovery for injury sustained while doing an act which is both foreseeable and necessary in the putting of the product to its ultimate intended use. See *Central Steel Tube Co.* v. *Herzog*, 203 F.2d 544 (8th Cir. 1953), where the lever of a grain swather was tied for packing in such a manner as to create great tension, creating a hidden danger to whomever unpacked the machine.

the light of the erroneous instruction pertaining to the liability of Simpson. The district judge granted the shipowner indemnification from Simpson for the full amount of the judgment and denied Simpson's claim of indemnity against the shipowner and the stevedoring company. It is apparent from the district judge's memorandum of decision in connection with these claims that his conclusions were derived in part from acceptance of the jury's factual determinations in all respects. In the light of this record, the interests of justice require that all judgments which were entered in the District Court be reversed and that there be a retrial of the case in all its aspects and in the light of the views which are expressed herein.

Reversed and remanded.

BROWNING, Circuit Judge, with whom Judges Hamley, Merrill, and Duniway concur, dissenting:

The majority holds that a manufacturer is required to guard against only those risks which it actually knows. The more limited the manufacturer's knowledge, the less onerous its duty. Ignorance, no matter how unjustified, affords a complete defense to a charge of negligence in the ordinary case.[1]

This, in the majority's view, is the only alternative to a holding that all manufacturers, in whatever circumstances, are charged with knowledge of every load-

[1] The majority opinion suggests two possible exceptions. A duty may arise "if a hazard is so obvious as to permit of no doubt that one could have anticipated it"; and a different rule, not articulated, may apply if "the product is inherently dangerous or harmful."

ing practice, however "peculiar," "unique," or "even strange," occurring in "any port which the purchaser, a shipper, or transporter might select for loading or embarkation."[2]

I

The case was tried and submitted to the jury upon a more sensible middle ground.

The jury was *not* instructed that Simpson "was obliged to learn" of the longshoremen's practice, no matter how unreasonable that obligation might be; the jury was *not* instructed that Simpson must "insure that [its] product be packaged in anticipation of whatever use to which it may be subjected by stevedores loading it as a part of a ship's cargo."

Quite the contrary, the trial court instructed the

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[2] We join the majority in passing over appellants' contentions (1) that the verdict was excessive, and (2) that a mistrial should have been declared because of an improper comment in the opening statement of plaintiff's counsel.

In a footnote reference to the first issue, the majority notes that plaintiff was not hospitalized, that his medical expenses were minimal, and that damages of $80,000 were awarded. The record also shows, however, that plaintiff's basic injury (a tear in a bicep muscle of his right arm, resulting in permanent loss of 80 per cent of the ability to turn the hand and one third of the lifting power of the arm), was not reparable, and that hospitalization and treatment would therefore have been futile. The record also shows that plaintiff's loss of income before trial was $5,000, and that his projected loss of future earnings totaled $65,000.

In a footnote reference to the second issue, the majority quotes a remark of the trial judge which might be read as suggesting doubt as to the correctness of his action in denying a mistrial. The record shows, however, that it was the trial judge's considered opinion, based on his personal observation of all the circumstances, that counsel's unfortunate comment was "pretty innocuous."

jury that the question was whether "the corporation *of ordinary prudence* [would] have exercised any greater care (that (*sic*) Simpson exercised) under *the same and existing circumstances.*"[3] Simpson "was under a duty to exercise *reasonable care* to employ such materials and methods in the construction and the packaging of the doors or warning of danger, if any there was, as were appropriate to the use for which it was intended and would render the packaged doors *reasonably safe* for handling in the course of shipment as Simpson Timber Company *might reasonably be charged* with in anticipation of the fact that the goods would flow in commerce." Simpson was required to exercise reasonable care to avoid injury to longshoremen walking on the cargo if, but only if, the jury found that Simpson "knew, or *in the exercise of reasonable care* should have known that workmen might walk on said packaged doors."

There was substantial evidence to support a jury finding that Simpson would have learned of the risk if it had acted with reasonable prudence.

Simpson assumed responsibility for packaging the doors properly for ocean carriage. It contracted to deliver the doors "suitably packaged for export shipment." It agreed to deliver them "FOB dock" in Portland, Simpson's home city, not at a distant port. The workmen at the Portland docks regarded walking on cargo as a necessary practice. The hold of a ship

[3] The emphasis is added, here and hereafter, unless otherwise indicated.

is of great depth, cargo must be loaded in layers, and longshoremen must walk on each layer of cargo stowed in place as they load the next. The practice was not unusual or peculiar, but was pervasive and long continued.

If Simpson did not know of the practice, it was aware of circumstances which should have suggested inquiry to a person of reasonable prudence. Simpson's manager had seen workmen walk on packaged doors while loading trucks at Simpson's plant. He "had been on the docks and seen the holds of ships, and * * * had 'wondered' how cargo was moved to portions of the hold away from the hatches."[4] Simpson knew that packaging cargo for export involved specialized problems, and that information regarding these problems was readily available. An expert in packaging cargo for export, whose offices were located on the Portland docks, testified that he had been consulted occasionally by Simpson.

Other door manufacturers exporting through Portland knew of the longshoremen's practice and the risk it involved. The Portland export-packaging expert testified that he had been consulted by twenty-five to thirty such manufacturers, and that it was their custom and practice to package doors for export so that they would be safe to walk on during loading.

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[4] Simpson's manager testified that Simpson had a warehouse in the Portland waterfront area which he visited each week or ten days; that Simpson shipped 16,000 to 18,000 doors overseas from Portland annually; and that Simpson was engaged in substantial importing operations.

The slightest effort on Simpson's part would have disclosed both the risk and the simple precautions necessary to avoid harm[5]—but Simpson's manager testified simply that he did not know how cargo was stowed aboard ship and made no effort to find out.[6]

II

Reason and authority support the trial court's conclusion that it was Simpson's duty to exercise reasonable care to avoid harm to longshoremen walking on cargo if (but only if) Simpson knew of the risk, or a person in Simpson's circumstances, exercising reasonable care, would have known of it.

"The very concept of negligence presupposes that the actor either does foresee an unreasonable risk of injury, *or could foresee it if he conducted himself as a reasonably prudent man.*" 2 Harper & James, The Law of Torts § 16.5, p. 907 (1956). The authors quote *Green* v. *Atlantic Charlotte Air Line Ry.*, 126 S.E. 441, 444 (S.C. 1925), "The foundation of liabil-

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[5] The export-packaging expert testified that it was the custom and practice on the Portland waterfront to package cargo with material strong enough to support a man, or to use open crates, or to cut holes in the packaging so that surfaces which would not be walked on were visible, or to place warning notices upon packages which appeared to be solid but in fact were not.

[6] Note 6 of the majority opinion suggests that the evidence may have been inadequate because it did not establish that it was the practice for longshoremen to carry a weight, or for more than one longshoreman to stand on a given package at the same time. The contention has no relevance to this case. The cardboard covering employed by Simpson is in evidence, and it is obvious from an examination of this exhibit that the thin cardboard which Simpson used was incapable of supporting a fraction of the weight of one, unburdened man.

ity for negligence is knowledge—or what is deemed in law to be the same thing, 'opportunity, by the exercise of reasonable diligence to acquire knowledge.' "

A manufacturer's[7] duty to exercise care extends to "risks which are created in the course of uses of the chattel which the manufacturer *should reasonably anticipate.*" Restatement (Second), Torts, § 395, comment j. A manufacturer must foresee and guard against a given risk if it is one "*which a reasonable manufacturer would anticipate* as likely enough to be taken into account"; and it is ordinarily "a question for the jury whether the maker should have anticipated it." Harper & James, *supra* § 28.6 p. 1546. See also 1 Frumer & Friedman, *supra* §§ 8.03, 8.05; Noel, *supra*, 71 Yale L. J. at 856-58 (1962).

The decision of the Court of Appeals for the Second Circuit in *Mazzi* v. *Greenlee Tool Co.*, 320 F.2d 821 (1963), illustrates the application of these principles. The defendant Greenlee Tool Company manufactured a pipe-bending press having a "shoe" as a component part. K. R. Wilson Company manufactured a similar machine. The Wilson press exerted a pressure of sixty tons psi against the "shoe," whereas defendant Greenlee's press was constructed to with-

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[7] A package is as much a product as its contents, and the manufacturer is subject to the same rules of liability as to both. Prosser, 50 Minn. L. Rev. 791, 805-06 (1966); 1 Frumer & Friedman, Products Liability § 5.03[1], p. 28 n. 22 (1966). See, for example, Land O'Lakes Creameries, Inc. v. Hungerholt, 319 F.2d 352, 360-61 (8th Cir. 1963); Butler v. L. Sonneborn Sons, Inc., 296 F.2d 623 (2d Cir. 1961); Central Steel Tube Co. v. Herzog, 203 F.2d 544, 546 (8th Cir. 1953); Restatement (Second), Torts § 395, comment (f) (5). Compare Great A & P Co. v. Miller, 316 F.2d 471 (5th Cir. 1963).

stand a pressure of only forty tons psi. Plaintiff (not in privity with Greenlee) was injured when a Greenlee "shoe" which had been attached to a Wilson press broke when pressure was applied in excess of forty tons psi. The trial court directed a verdict in Greenlee's favor on two grounds, one of which was that the Greenlee "shoe" was designed and intended for use only on a Greenlee press. The Court of Appeals reversed.

The Court of Appeals held that it was error to direct a verdict "if the evidence was such that a jury could reasonably find that use [of a Greenlee 'shoe'] on a Wilson press was intended by the manufacturer *or was reasonably foreseeable* and that failure to warn against the danger of such usage constituted negligence in the circumstances." 320 F.2d at 823.

Greenlee officials testified that Greenlee "shoes" were "not sold as single items to be used in any machine other than a Greenlee press." But plaintiff offered evidence "that it was the custom in the trade to buy the shoes independently of the machines," "that it was common practice to 'adapt one shoe from one press to another press,'" and "that at the time of the accident Greenlee shoes were customarily sold [by retailers] as separate units and when sold no inquiry was made by the retailer as to their prospective use." 320 F.2d at 824-25. The Court of Appeals held that plaintiff's evidence "was sufficient to support a jury resolution that the use of the shoe on a Wilson rather than a Greenlee press * * * was intended or that de-

fendant *should have reasonably foreseen* that its shoe would be so used and that failure to warn of the danger involved in such usage constituted negligence." 320 F.2d at 825.

The holding of the majority that liability is limited to injuries caused by risks which the manufacturer actually knew is irreconcilable with the decision in *Mazzi*. It is also contrary to the other well considered cases which recognize that the doctrine restricting liability to injuries resulting from the "intended use" of a manufacturer's products "is but a convenient adaptation of the basic test of 'reasonable foreseeability' framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence." *Spruill* v. *Boyle-Midway, Inc.*, 308 F.2d 79, 83 (4th Cir. 1962). See *Land O'Lakes Creameries, Inc.* v. *Hungerholt*, *supra*, 319 F.2d 352, 361 (8th Cir. 1963); *Butler* v. *L. Sonneborn Sons, Inc.*, *supra*, 296 F.2d 623, 625-26 (2d Cir. 1961). See also 1 Frumer & Friedman, *supra*, Products Liability §§ 8.03, 8.05, 15 (1964).

These and similar cases cannot be disposed of by attaching the label "inherently" or "imminently" dangerous to the products involved. These are simply adjectives applied *after* it has been decided that liability will be imposed; they are of no help in reaching that decision.[8] The "shoe" in *Mazzi*, the furniture polish

[8] "Although some decisions continue to speak the language of 'inherent danger,' it has very largely been superseded by a recognition that what is involved is merely the ordinary duty of reasonable care imposed upon the manufacturer, as to any

in *Spruill*, the fertilizer in *Land O'Lakes*, the barrel in *Butler*, were not dangerous instrumentalities *per se*. Few things are dangerous in all circumstances; most things are dangerous in some.[9] Simpson's bundle of doors was innocuous for most purposes, but when "used as a floor, or walking surface, the bundle of doors was a trap." As the trial court instructed the jury, the question is simply whether a person of reasonable prudence, in Simpson's position, would have foreseen that risk.

The majority cites no authority supporting the "recognized tort rules" which require a manufacturer to exercise reasonable care to eliminate known hazards but not hazards which a reasonably prudent manufacturer would have foreseen. *McCready* v. *United Iron & Steel Co.*, 272 F.2d 700 (10th Cir. 1959), and *Cohagan* v. *Laclede Steel Co.*, 317 S.W.2d 452 (Mo. 1958), announce no such principle. In each case the appellate court agreed with the trial court that the evidence was insufficient to charge the defendant with the knowledge of the risk, but in neither

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product which he can reasonably expect to be dangerous if he is negligent in its manufacture or sale." Restatement (Second), Torts § 395 comment a. See also 2 Harper & James, The Law of Torts, § 28.9 at 1552-55, § 28.11 at 1559 (1956); 1 Frumer & Friedman, Products Liability § 5.03[1] (1966); Noel, 71 Yale L. J. 816, 818 (1962).

[9] "Duty of care has been found in the manufacture or sale of coffee urns, cigarettes, hair combs, sewing machines, a bottle of perfume, a sanitary napkin, a ladder, a chain, a pully, gasoline and electric stoves, and a sofa bed. It is certainly the prevailing view that it extends to any product whatever which, if in fact negligently made, may reasonably be expected to be capable of inflicting injury." Prosser, Law of Torts § 84 at 500-01 (2d ed. 1955), § 96 at 662 (3d ed. 1964).

did the court hold that evidence of actual knowledge was required. As the majority's quotation from *McCready* indicates, the Court of Appeals for the Tenth Circuit recognized that a duty to exercise proper cauiton would arise if the risk were one "reasonably anticipated,"[10] and the Court of Appeals for the Tenth Circuit held only that "there was no showing that [the defendant manufacturer] had knowledge of the practice of workmen in using the crossbars in casements for handholds or footrests, *or that the practice was so general that it was charged with knowledge thereof.*" 272 F.2d at 703.[11] Similarly, the court in *Cohagan* found a failure of proof because there was no "*substantial evidence of a custom or usage* imposing a duty on [the defendant manufacturer] to recognize the attempted use as a proper or intended use" (317 S.W.2d at 454); and the Supreme Court of Missouri held only that evidence that the use resulting in injury occurred "*on isolated occasions* does not tend to establish a duty on the part of the manufacturer ***" (317 S.W.2d at 457). Thus the rationale of these cases is not inconsistent with the trial court's instructions in the present case, but supports those instructions.[12]

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[10] Compare the majority's suggestion that *McCready* holds that the manufacturer must "intend or anticipate" the use for a duty to arise.

[11] Compare the majority's statement that *McCready* held that "the manufacturer was not under a legal duty to investigate all customs, *however universal* * * *."

[12] The majority's holding is also contrary in principle to Weeks v. Michigan Chrome & Chem. Co., 352 F.2d 603, 611 (6th Cir. 1965), in which the court granted a new trial in part because of an instruction which limited contributory negligence in a products liability case to risks actually known to the plaintiff.

The majority suggests that the "almost total dearth of cases involving similar situations" indicates that manufacturers have not in fact ignored the dangers to which handlers of their products may be exposed. Before the majority spoke, a well advised manufacturer would not have assumed that he could safely rely upon ignorance of risks which a reasonably prudent person would have discovered. Moreover, a latent defect in cargo packaging renders the vessel unseaworthy (*Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 212-13 (1963); *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962); *United States Lines Co.* v. *King*, 363 F.2d 658, 661 (4th Cir. 1966); *Reddick* v. *McAllister Lighterage Line, Inc.*, 258 F.2d 297, 299 (2d Cir. 1958)), and injured longshoremen would ordinarily sue the ship, rather than the packager, to avoid the burden of proving negligence. 54 Geo. L.J. 1939 n. 2 (1966).

This suggests another unfortunate consequence of the rule adopted by the majority. It is generally thought desirable to impose the burden of loss upon the person best able to remove the risk. *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 323-24, n. 10 (1964). But under the majority decision, liability falls upon the ship without regard to fault, and, in this case, in the face of a finding by the trial court (made after a separate trial of the issue of indemnity) that the shipowner neither knew nor in the exercise of reasonable care could have known of the dangerous condition of the package. Simpson, on the other hand, is freed from liability, though only Simp-

son knew of the latent defect and might have taken steps to eliminate it. No one else could have discovered the danger without dismantling or destroying the package—in the face of a warning, printed on the cardboard cover by Simpson, that the cover was not to be removed until the doors were unpacked for installation.

Even if the majority is right in faulting the instruction as to Simpson's negligence, this affords no justification whatever for setting aside the verdict in plaintiff's favor against Grace Lines. Grace Lines does not seek review of the determination that it was liable to plaintiff; its appeal is limited solely to the alleged excessiveness of the verdict. Under the trial court's instructions, the verdict against Grace Lines was based entirely upon the jury's determination that the vessel was unseaworthy. Although the majority suggests it "may have been influenced in some degree by considerations which were applied in the light of the erroneous instructions pertaining to the liability of Simpson," the majority does not indicate what these "considerations" may have been. It would be impossible to do so. Simpson's negligence had no relevance whatever to the liability of Grace Lines, and the instructions made this entirely clear.

The case was properly submitted to the jury,[13] and the judgment should be affirmed.

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[13] Speaking only for himself, and not for the other Judges joining in this dissent, the writer would note that the trial court's instructions might well have gone farther than they did. When Simpson undertook to package doors for export it

was required to anticipate not only those risks which were reasonably foreseeable to Simpson, in Simpson's particular circumstances, but also such risks as were foreseeable to those who were engaged at the time and place in question in the business which Simpson chose to enter. "In the field of manufacturers' liability questions of foreseeability are closely entwined with the status of the defendant; as a manufacturer he is held to the knowledge and skill of an expert in his field." Noel, supra, 71 Yale L. J. at 847-48 (1962). "[M]en who engage in certain activities or come into certain relationships with people or things are under peculiar obligation to acquire knowledge and experience about that activity, person or thing. * * * Thus * * * the manufacturer must learn of dangers that lurk in his processes and his products." 2 Harper & James, supra §16.5 at 915.

See also Guffie v. Erie Strayer Co., 350 F.2d 378, 381 (3d Cir. 1965); Braun v. Roux Distrib. Co., 312 S.W.2d 758, 763 (Mo. 1958); Prosser, Law of Torts § 31 at 131-32 (2d ed. 1955), § 32 at 163 (3d ed. 1964). Dean Prosser quotes Gobrecht v. Beckwith, 135 Atl. 20, 22 (N.H. 1926), "Where a duty to use care is imposed and where knowledge is necessary to careful conduct, voluntary ignorance is equivalent to negligence."

To hold otherwise would encourage deliberate ignorance and reduce the incentive for newcomers to acquire information known to those in the industry which might prevent injury or death. As noted earlier, there was ample evidence that other persons then engaged in the business of packing doors for export across the Portland docks were well aware of the longshoremen's loading practices.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIMPSON TIMBER CO. and GRACE LINE, INC.,
Appellants,
v.
EZRA PARKS,
Appellee.

SIMPSON TIMBER CO.,
Appellant,
v.
GRACE LINE, INC., et al.,
Appellees.

No. 19,673

[December 3, 1965]

Appeal from the United States District Court
for the District of Oregon

Before: HAMLEY, BROWNING, and ELY, Circuit Judges. BROWNING, Circuit Judge:

A longshoreman stowing cargo in the hold of a vessel was injured when he broke through the packaging on a bundle of doors. He sued the shipowner and the company which manufactured and packaged the doors. The shipowner and the manufacturer exchanged cross-claims for indemnity. The manufacturer brought in the stevedore (the longshoreman's employer) as a third-party defendant. The main action was tied before a jury. The indemnity claims were tried to the judge. The jury returned a verdict against the man-

ufacturer and the shipowner. The court granted the shipowner indemnity from the manufacturer. The manufacturer and the shipowner appeal.

I

The manufacturer challenges the sufficiency of the evidence to take the issue of its liability for negligence[1] to the jury. We think the evidence was sufficient.

The doors were packed in a bundle 42 inches high. Each door in the bundle had a large opening in the center to accommodate a pane of glass to be installed at destination. The window openings were aligned so that they formed a well. The manufacturer wrapped corrugated cardboard around the center of the bundle, leaving the solid edges of the doors exposed, but concealing the interior cavity. The manufacturer fastened wooden chocks across one side of the bundle to form a base. When the bundle rested on its chocks the well created by the window openings extended vertically from top to bottom. No warning was given of the hollow interior, by notice on the package or otherwise. Printing on the package identified the contents as "fine doors."

The vessel was carrying a cargo of plywood, canned goods, sacked flour, and bundles of doors. The hold was loaded in layers, cargo resting upon cargo. As each layer was stowed, the longshoreman used it

[1] The longshoreman did not rely upon alternative theories of breach of warranty or strict manufacturer liability. 1 Frumer & Friedman, Products Liability § 16 (1964); Prosser, Law of Torts §§ 95, 97 (1964).

as a floor to stow the next. The plaintiff longshoreman stepped on the bundle of doors while carrying a sack of flour across a floor of cargo. He broke through the cardboard into the hole beneath.

Used as a floor, the bundle of doors was a trap. Anyone who stepped on it was bound to be injured, perhaps severely. The danger was readily avoidable.[2] However, the manufacturer argues that the maker of a product is liable only for injuries resulting from its "normal" or "intended" use; and that the packaging was intended to protect the doors from damage and not for use as a floor.

The doctrine of " 'intended use' is but a convenient adaptation of the basic test of 'reasonable foreseeability' framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence." *Spruill* v. *Boyle-Midway, Inc.*, 308 F.2d 79, 83 (4th Cir. 1962).[3] The question is simply whether the jury could rationally conclude that the manufacturer knew or in the exercise of reasonable care should have known that the packaged doors might be walked on in the loading of the vessel.

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[2] "The manufacturer does not have to make a product which is 'accident-proof' or 'fool-proof.' Liability is imposed only when an unreasonable danger is created. Whether or not this has occurred should be determined by general negligence principles, which involve 'a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm." Noel, 71 Yale L.J. 816, 818 (1962). See also 2 Harper & James, The Law of Torts § 28.4 at 1542 (1956).

[3] See also Mazzi v. Greenlee Tool Co., 320 F.2d 821, 823-25 (2d Cir. 1963); Butler v. L. Sonneborn Sons, Inc., 296 F.2d 623, 625-26 (2d Cir. 1961); 1 Frumer & Friedman, Products Liability §§ 8.03, 8.05, 15 (1964).

The evidence was uncontradicted that longshoremen customarily walked on stowed cargo while loading succeeding layers; that cargo which appeared to be capable of supporting a man was not opened for inspection, but was assumed to be solid unless marked to the contrary; and that dunnage or "walking boards" were used only when cargo appeared to be breakable or was so marked. There was evidence that persons who packed cargo for export customarily considered the fact that the cargo would be loaded in layers in the hold of a vessel and would be walked upon; and that to prevent injuries to longshoremen they customarily (1) covered holes in packaged cargo with material strong enough to bear a man, or (2) cut holes in the packaging to expose the dangerous condition, or (3) placed warning notices upon packages which appeared to be solid but were not.

The manufacturer relied upon testimony of its plant manager, who said he did not know how cargo was stowed aboard ship and did not inquire; that he did not know cargo was walked upon but supposed it was moved by a mechanical fork-lift; that he packaged the doors accordingly; and that he had received no complaints in the past. The manufacturer also presented testimony of an official of another door manufacturer that his company packaged doors in the same way for the same reasons.

The jury was free to disbelieve the plant manager's denial, and to conclude from the evidence that the manufacturer in fact knew of the risk. As we have

said, uncontradicted testimony established that it was common practice to walk on cargo in loading ships. The manufacturer had sold 16,000 to 18,000 doors for overseas shipment annually for years. The doors were delivered directly to the docks. The plant manager admitted that he had been on the docks, had seen the holds of ships, and had "wondered" how cargo was moved to portions of the hold away from the hatches. There was testimony that on occasion the manufacturer had consulted an expert in the packaging of cargo for overseas shipment. If the jury concluded from this evidence that the manufacturer was aware of the risk, the manufacturer would be liable for its failure to exercise reasonable care to avoid the foreseeable injury.[4]

Even if the jury accepted the plant manager's profession of ignorance as true, the manufacturer would not be immunized from liability. One who undertakes to manufacture a product for distribution to others is charged with the knowledge and skill of an expert in the field he voluntarily enters.[5] He must inform himself of the dangers common to the trade.[6] To hold otherwise would encourage deliberate ignorance, and

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[4] Mazzi v. Greenlee Tool Co., 320 F.2d 821, 823-25 (2d Cir. 1963); Restatement, Torts §§ 289, 290, comment 290(e) (1934); 2 Harper & James § 28.2 (1956).

[5] Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467, 470 (3d Cir. 1950); Braun v. Roux Distrib. Co., 312 S.W.2d 758, 763 (S. Ct. Mo. 1958); 2 Harper & James § 28.4 at 1541 (1956); Noel, 71 Yale L. J. 816, 847-48 (1962).

[6] Prosser, Law of Torts § 32 at 163 (3d ed. 1964); Note, 23 Minn. L. Rev. 628, 657-58 (1939); 2 Harper & James § 16.5 at 915-16 (1956).

would remove incentive for the acquisition of the skill and knowledge which was available to prevent injuries.

The packaging was as much the manufacturer's product as the doors themselves. A manufacturer who places packaged doors in the stream of commerce is charged with knowledge that they will be handled by persons engaged in commerce, and is required to discover the dangers to which the packaging might expose such persons in the normal course of their work.[7] Moreover, under its contract with the shipper the manufacturer expressly obligated itself to make sure that the doors were "suitably packed for export shipment." As we have noted, there was direct testimony of an expert in the field of packaging for export that it was common knowledge in this field that cargo would be walked on in loading.[8] The testimony of the

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[7] Central Steel Tube Co. v. Herzog, 203 F.2d 544, 546 (8th Cir. 1953). Restatement, Torts § 388, comment (a), and § 395, comment (c) (5); 1 Frumer & Friedman, Products Liability § 5.03[1] n.22 (1964). See also Land O'Lakes Creameries, Inc. v. Hungerholt, 319 F.2d 352, 360-61 (8th Cir. 1963); Butler v. L. Sonneborn Sons, Inc., 296 F.2d 623 (2d Cir. 1961).

[8] The manufacturer objected to the qualification of this witness on the ground that, although he was an expert in the field of packaging doors and other cargo for export, he was not a manufacturer of doors and was not shown to be familiar with practices and customs of those who were. The trial court did not err in overruling this objection. The relevant field was that of packaging doors for export. Negligence in the manufacture of doors was not alleged. By undertaking to engage in packaging doors for export, the manufacturer was charged with knowledge of the relevant customs and practices of experts in that field. Its obligation to acquire such knowledge was not diminished because it also engaged in the manufacture of doors. The decisions relied upon by the manufacturer [Green Mountain Log Co. v. Columbia & Nehalem River R.R., 141 Or.

two door manufacturers that they lacked such knowledge, and had received no complaints regarding their packaging, was at most grist for the jury's mill.[9]

The manufacturer argues that the maker is liable only if his product is "inherently" or "imminently" dangerous, citing *O'Neill* v. *American Radiator Co.*, 43 F. Supp. 543 (S.D.N.Y. 1942). We doubt that this formulation (drawn from language in *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), retains any valid function,[10] except perhaps, to identify two situations in which danger is foreseeable. In any event, the package of doors was "imminently" dangerous when used by longshoremen in the manner which the manufacturer had or should have anticipated,[11] that is, in the formation of a floor for loading.

The manufacturer earnestly urges that *McCready* v. *United Iron & Steel Co.*, 272 F.2d 700 (10th Cir. 1959), and *Cohagan* v. *Laclede Steel Co.*, 317 S.W.2d 452 (Mo. 1958), are contrary to the decision below.

188, 16 P.2d 1106 (1932); Holmes v. Whitaker, 23 Or. 319, 31 Pac. 705 (1892)] are not to the contrary.

[9] A "long history of good fortune" will not preclude a jury finding of negligence. Butler v. L. Sonneborn Sons, Inc., 296 F.2d 623, 626 (2d Cir. 1961). See also Martin v. Bengue, Inc., 25 N.J. 359, 371, 136 A.2d 626, 632 (1957).

[10] 2 Harper & James § 28.4 at 1542, § 28.9 at 1552-55, § 28.11 at 1559 (1956); 1 Frumer & Friedman, Products Liability § 5.03[1] (1964); Noel, 71 Yale L.J. 816, 818 (1962), quoted *supra* n.2.

[11] Southern Arizona York Refrigeration Co. v. Bush Mfg. Co., 331 F.2d 1 (9th Cir. 1964) (product imminently "dangerous when applied to its intended use in the usual and customary manner"). See also Martin v. Bengue, Inc., 25 N.J.2d 359, 136 A.2d 626, 630-31 (1957).

In *McCready* the court stated, without further comment, "there was testimony that it was common practice" for workmen to use the manufacturer's product in the way which led to the injury. Nonetheless, the court concluded, "there was no showing . . . that the practice was so general that [the manufacturer] was charged with knowledge thereof." 272 F.2d at 703. We confess our inability to satisfactorily explain the apparent inconsistency in the court's evaluation of the proof. In any event, as we have said, we are satisfied that there was ample evidence in the record in this case to establish both a common practice to walk on cargo during loading and general knowledge of this usage among those who held themselves out as qualified to carry on the business of packing cargo for export.

In *Cohagan* the court stated that evidence of the practice resulting in the injury was limited to "isolated occasions" (317 S.W.2d at 457), and that this was not "substantial evidence of a custom or usage" (317 S.W.2d at 454). This holding is inapplicable to the present case.

The manufacturer's separately stated argument that use of the cargo as a floor constituted "an independent intervening cause" raises in this case only the issue of foreseeability[12] with which we have already dealt.

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[12] See Restatement, Torts § 302, comment c, §§ 447, 449. *Cf.* Restatement, Torts § 442.

II

The manufacturer urges that the trial court erred in denying a motion for mistrial based upon a remark in the opening statement of longshoreman's counsel. Counsel described the manufacturer's packing methods, and then remarked: "They don't do it now after this happened." The remark may well have been improper. Evidence of subsequent precautions is not admissible to show prior negligence.[13] However, in light of the whole record in this case, refusal to grant a mistrial for counsel's remark alone cannot be characterized as "inconsistent with substantial justice" (Fed. R. Civ. P. 61). Counsel began his opening statement with the admonition that nothing he might say should be taken as evidence; the offending remark was short, was not repeated, and in context passes almost unnoticed; the manufacturer's counsel declined the court's offer to give specific curative instruction; and during the trial the court repeatedly informed the jury that the case was to be decided only upon the evidence, and that counsel's statements were not evidence and were to be disregarded. We agree with the trial court's judgment that counsel's unfortunate comment appears "pretty innocuous."

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[13] Columbia & Puget Sound R.R. v. Hawthorne, 144 U.S. 202, 207-08 (1892); Cox v. General Electric Co., 302 F.2d 389, 390 (6th Cir. 1962); Johnson v. United States, 270 F.2d 488, 491-92 (9th Cir. 1959); 2 Wigmore, Evidence § 283 (3d ed. 1940); Annot., 64 A.L.R.2d 1296 (1959).

This court has recognized an exception allowing admission of such evidence to show the practicability of using a safeguard. Boeing Airplane Co. v. Brown, 291 F.2d 310, 315 (9th Cir. 1961); Johnson v. United States, *supra*.

III

Both the manufacturer and the shipowner attack the verdict of $80,000 as excessive. Assuming power to review the amount of a jury award,[14] the scope of review is narrow. As we have recently said, "we can move when the award is monstrous in size or ridiculously low, but not otherwise." *Steinbock* v. *Schiewe*, 330 F.2d 510, 512 (9th Cir. 1964).

The jury heard the following testimony. The longshoreman injured his back, left ankle, and right arm. His back and ankle injuries were painful, but not permanent. The injury to his right arm consisted of a tear in the bicep muscle. This injury cannot be repaired. It resulted in the permanent loss of 80 per cent of the longshoreman's ability to turn his right hand, and of one third of the lifting power of his right arm. His arm tires quickly, and the muscle knots and becomes useless when he attempts to lift. He is disabled from performing heavy longshoremen's labor. The availability of other longshoring work is limited. His education stopped at the ninth grade. He has no job training or experience except as a manual laborer. Loss of future earnings was calculated at $65,976, based upon his loss of wages as a longshoreman during the year following his injury,[15] projected over the period of his work expectancy, and reduced to present value. Income lost between injury and trial exceeded

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[14] Neese v. Southern Ry., 350 U.S. 77 (1955).

[15] The base figure omitted certain income which the longshoreman's evidence indicated was not likely to recur.

$5,000. An award of a balance of $10,000 for past and future pain and suffering is not "monstrous in size."

The manufacturer also argues that the award should be set aside because greater than the amount prayed for in the complaint. The first sentence of Rule 54(c), Fed. R. Civ. P., provides: "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." However, the second sentence states that in all other cases "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." The manufacturer argues that the word "relief" in the second sentence should be read "equitable relief," thus excluding money damages. The context strongly suggests the contrary. So also does the general principle of Rule 15(c), that "in a contested case the judgment is to be based on what has been proved rather than what has been pleaded." 3 Barron & Holtzoff, Federal Practice & Procedure § 1194 at 35 (1958). The federal authorities are uniform that a verdict is not limited by the *ad damnum* clause.[16] This does not render the *ad damnum* clause meaningless as the manufacturer contends; the clause

[16] United States v. H. G. Cozard Constr. Co., 234 F.2d 617 619-20 (10th Cir. 1963); Riggs, Ferris & Geer v. Lillibridge, 316 F.2d 60, 62-63 (2d Cir. 1963); Rosden v. Leuthold, 274 F.2d 747, 750 (D.C. Cir. 1960); Neff v. Western Co-op Hatcheries, 241 F.2d 357, 362-63 (10th Cir. 1957); Couto v. United Fruit Co., 203 F.2d 456, 457 (2d Cir. 1953). *Cf.* Wendy v. McLean Trucking Co., 279 F.2d 958, 959 (2d Cir. 1960); 6 Moore, Federal Practice § 54.62 (2d ed. 1953); 3 Barron & Holtzoff, Federal Practice & Procedure § 1194 (1958).

limits the amount of a default judgment, as Rule 54(c) expressly provides.

IV

The shipowner claimed indemnity from the manufacturer. The manufacturer sought indemnity from the shipowner and the stevedore. By stipulation these issues were tried to the court, which ruled in favor of the shipowner and against the manufacturer.

1. We consider first the shipowner's claim for indemnity from the manufacturer.

The district court found that the manufacturer was negligent in packaging the bundle of doors and in failing to warn of the danger, and that this negligence was the sole cause of the longshoreman's injuries. The court further found the vessel was unseaworthy because of the presence of the bundle, and for no other reason; and that the shipowner neither knew nor in the exercise of reasonable care could have known of the bundle's dangerous condition, and was not otherwise negligent.[17]

The shipowner's liability thus rested solely upon the shipowner's breach, without fault, of its nondelegable duty to provide the longshoreman a safe place to

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[17] The jury verdict was consistent with the court's findings. The only question submitted to jury with regard to the shipowner's liability was whether the presence of the unmarked bundle made the working surface unsafe. The jury was instructed that if it did, the vessel was unseaworthy, and the shipowner was liable though wholly without fault.

work, and the unseaworthy condition[18] was created solely by the manufacturer's wrongdoing. If the shipowner pays the judgment and thus discharges the manufacturer's obligation, the manufacturer cannot equitably retain the benefit thus conferred. In these circumstances, settled principles of quasi-contract require the manufacturer to hold the shipowner harmless.[19]

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[18] Presence of defective cargo containers may render a vessel unseaworthy. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 212-13 (1963); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962). In *Gutierrez* the Supreme Court explicitly approved the holding in Reddick v. McAllister Lighterage Line, Inc., 258 F.2d 297, 299 (2d Cir. 1958), "that a longshoreman could recover for injuries caused by a 'latent defect' in a cargo crate which broke when the longshoreman stood on it." 373 U.S. at 213.

[19] States S.S. Co. v. Rothschild Int'l Stevedoring Co., 205 F.2d 253, 255 (9th Cir. 1953), and authorities cited; Prosser, Law of Torts § 48 at 279 (3 ed. 1964); Keener, Quasi-Contracts 408-09 (1893); Woodward, Quasi-Contracts §§ 258-59 (1913); Comment, 15 Hastings L.Rev. 530, 541 (1964). *Cf.* American President Lines, Ltd. v. Marine Terminals Corp., 234 F.2d 753, 756-57 (9th Cir. 1956) (dictum); Burris v. American Chicle Co., 120 F.2d 218, 222 (2d Cir. 1941); Standard Oil Co. v. Robins Dry Dock & Repair Co., 32 F.2d 182, 183 (2d Cir. 1929); Pierce v. Winsor, 19 Fed. Cases No. 11,150 (C.C. Mass. 1861); Kennedy v. Colt, 339 P.2d 450, 453 (Or. 1959). Cases imposing primary liability on the tortfeasor, rather than a faultless shipowner, for maintenance and cure due the injured seaman from the shipowner, or granting the shipowner indemnity for prior payments, rest upon similar principles. Gilmore & Black, Law of Admiralty § 614 at 271-72 n.74, § 618 at 276-77 (1957).

In sustaining the district court's judgment granting indemnity against the manufacturer on this ground, we do not mean to suggest that other grounds, not advanced by the shipowner on appeal, would not serve as well. Possible alternative grounds are: (1) that the shipowner was entitled to the benefits of the *express contractual obligation* of the manufacturer to the shipper to package the doors suitably for export, which, if discharged would have satisfied the shipowner's obligation to provide a safe place to work, and whose breach had the foreseeable

By imposing ultimate liability upon the negligent manufacturer, the loss is placed upon the actor whose default caused the injury. The one best able to eliminate the risk is given the greatest incentive to do so.[20]

Since the manufacturer was not the longshoreman's employer, allowing indemnity against the manufacturer does not conflict with the provisions of the Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), 33 U.S.C.A. § 901 et seq.

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consequence of the shipowner's liability to the longshoreman for unseaworthiness [Crumady v. The J. H. FISSER, 358 U.S. 423, 428 (1959); Williams v. Pennsylvania R.R., 313 F.2d 208, 210-12 (2d Cir. 1963); De Gioia v. United States Lines Co., 304 F.2d 421, 425-26 (2d Cir. 1962); Restatement, Contracts §§ 133(1)(b), 141 (1932)]; (2) that the shipowner was entitled to recover damages, similarly measured, for breach by the manufacturer of *implied-in-fact warranty* that the packaging was suitable for its foreseeable use as a working floor for the longshoreman [Eastern Motor Express Inc. v. A. Maschmeijer, Jr., Inc., 247 F.2d 826, 828 (2d Cir. 1957); Luckenbach S.S. Co. v. Coast Mfg. & Supply Co., 185 F. Supp. 910, 922 (E.D.N.Y. 1960); The RICHELIEU, 27 F.2d 960, 968 (D. Md. 1928) (dictum). See also Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 318 (1964); Crumady v. The J. H. FISSER, 358 U.S. 423, 428-29 (1959); Halliburton Co. v. Norton Drilling Co., 302 F.2d 431, 438-41 (5th Cir. 1962) (dissenting opinion) and authorities cited therein; American President Lines, Ltd. v. Marine Terminals Corp., 234 F.2d 753, 758 (9th Cir. 1956); Shell Oil Co. v. Foster-Wheeler Corp., 209 F.Supp. 931, 945 (E.D. Ill. 1962), *aff'd* 320 F.2d 591 (7th Cir. 1963). *Cf.* Horton v. Moore-McCormack Lines, Inc., 326 F.2d 104 (2d Cir. 1964)]; or (3) that in negligently packaging the doors the manufacturer violated a *duty owed directly to the shipowner to exercise reasonable care* to avoid the foreseeable harm of the shipowner's liability to the longshoreman [See Williams v. Pennsylvania R.R., 313 F.2d 208, 212 (2d Cir. 1963); De Gioia v. United States Lines Co., 304 F.2d 421, 425-26 (2d Cir. 1962); States S.S. Co. v. Rothschild Int'l Stevedoring Co., 205 F.2d 208, 255-56 (9th Cir. 1953); Jones v. Waterman S.S. Corp., 155 F.2d 496, 500 (3d Cir. 1946)].

[20] Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 323-24 n.10 (1964).

(1952), limiting the liability of longshoremen's employers. Allowing indemnity serves the congressional purpose (apparent in section 933 of the Act) of placing ultimate loss on the third-party wrongdoer, a purpose almost universal to compensation statutes.[21]

The manufacturer contends that this result is precluded by the rule of *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), which confined contribution between joint tortfeasors to collision cases. As noted in *Halcyon*, 342 U.S. at 285, the general common-law rule bars contribution between joint tortfeasors.[22] Admiralty recognized an exception to this rule in collision cases. *Halcyon* simply declined to add further exceptions. The common-law rule which *Halcyon* affirmed went no further than to bar contribution between joint tortfeasors. Where "the shipowner's claim . . . is not a claim for contribution from a joint tortfeasor . . . the considerations which lead to the decision in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282, are not applicable." *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 133 (1956).[23] In a case such as ours, in which only one party was at fault, the common law allowed indemnity in favor of the innocent party upon whom liability for the wrongdoer's fault had fallen.[24] Accordingly, in *States S.S. Co.* v. *Rothschild Int'l Steve-*

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[21] Larson, Workmen's Compensation Law § 71.10 (1961).

[22] Restatement, Restitution § 102 (1936).

[23] Mickle v. The H. W. SCHULTE, 188 F.Supp. 77 (S.D. Calif. 1960), relied upon by the manufacturer, also involved joint tortfeasors.

[24] Note 19.

doring Co., 205 F.2d 253, 254-55 (9th Cir. 1953), this court held that *Halcyon* did not bar the allowance of indemnity upon quasi-contractual principles against one solely at fault.[25]

The manufacturer suggests that the shipowner is a "joint tortfeasor," because its liability, though absolute, is founded in tort. The rule barring contribution is based on the concept "that the law will not assist a wrongdoer in shifting or disturbing the burden of damage where his own wrong contributed to the damage." Tetreault, 39 Cornell L.Q. 381, 422 (1954). It applies to persons who have "negligently injured a third person" [Restatement, Restitution § 102], and not to persons who are without fault. The fact that the shipowner's duty to provide a safe place to work —to borrow language from an analogous case — "could not be delegated so as to relieve it from liability to the plaintiff does not make [the shipowner and the manufacturer] joint tortfeasors or free [the manufacturer] from liability as indemnitor." *Burris* v. *American Chicle Co.*, 120 F.2d 218, 222 (2d Cir. 1941).

Comments of the Supreme Court to the effect that the comparative negligence of the parties is irrelevant in cases involving implied-in-fact contractual indemnity[26] offer no rational support for the manufacturer's argument that implied-in-law quasi-con-

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[25] See also American President Lines, Ltd. v. Marine Terminals Corp., 234 F.2d 758, 760 (9th Cir. 1956); Gilmore & Black, Law of Admiralty § 6-57 at 367, 369 (1957).

[26] See, *e.g.*, Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 319 n.5 (1964); Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 569 (1958).

tractual indemnity may not be allowed in a proper case. The Supreme Court has rejected any assumption that the latter question is foreclosed.[27]

2. The manufacturer's claim that it should be indemnified by the shipowner or the stevedore is without merit.

Since the injuries were caused solely by the manufacturer's negligence, and the shipowner and stevedore were without fault, there is no basis for imposing quasi-contractual indemnity upon the latter. The manufacturer points to no express promise to indemnify it. It suggests that it is the beneficiary of implied-in-fact obligations said to run from the shipowner to the shipper, and from the stevedore to both, to perform the work of loading cargo in a safe and workmanlike manner. The argument is in substance an impermissible effort by the manufacturer to use the shipowner's and stevedore's failure to discover and correct the manufacturer's own breach of duty as a defense.[28] Moreover, since the injury was caused solely by a defect in packaging which was neither known nor apparent to the shipowner or stevedore, the injury did not result from a breach of warranty of workmanlike service by either.[29]

Affirmed.

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[27] Ryan Stevedoring Co v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 132 n.6 (1956).

[28] Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 134-35 (1956); Horton v. Moore-McCormack Lines, Inc., 326 F.2d 104, 107 (2d Cir. 1964).

[29] Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962). *Cf.* Caputo v. United States Lines Co., 202 F.Supp. 600, 605 (E.D.N.Y. 1962). Section 3(2) of Carriage of Goods by Sea Act [46 U.S.C.A. § 1303(2)] adds nothing to the manufacturer's argument.

ELY, Circuit Judge, Dissenting:

I dissent. The majority upholds a judgment which in my view, not only effects a miscarriage of justice, but also rests upon a principle hitherto foreign to the law of torts.

The jury awarded the longshoreman general damages of $75,000 and special damages of $5,000, approximately $2,000 for each of the forty-two vertical inches of his fall. The majority fails to mention that the total alleged medical expenses for all necessary and desired medical attention and treatment amounted to $76.25. The suit was filed in the Circuit Court of the State of Oregon. As to complaints filed in that court, Oregon's statute provides, "If the recovery of money or damages is demanded, the amount thereof shall be stated." Ore. Rev. Stat. § 16.210(2) (c) (Supp. 1959). The amount stated as damages in both the original and an amended complaint was $60,000, plus medical and hospital expenses of $72.00, plus lost wages, and through discovery proceedings, pre-trial hearing, and the trial itself, following removal to the Federal District Court, the plaintiff never sought to amend or enlarge the general demand.[1] It is quite apparent that

[1] The accident occurred on September 8, 1962. The original complaint was filed on March 22, 1963, approximately six months later. The amended complaint in the Oregon court was filed on April 11, 1963. Both of these documents alleged medical and hospital expenses in the amount of $72. In an answer to an interrogatory verified on October 7, 1963, the plaintiff

counsel, who prepared the complaint and conducted all proceedings in behalf of the plaintiff, were experienced and competent. All this notwithstanding, the majority holds that a verdict awarding general damages of $15,000 above the amount which the plaintiff himself repeatedly specified as the true and fair amount of such damages is not shocking and shall be permitted to stand! Had the plaintiff been able to maintain his choice of pursuing relief in the Oregon courts, he would have been prevented by Oregon law from recovering general damages of more than $60,000. Ore. State Bar Uniform Jury Instruction No.

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swore that his total medical expense as a result of the accident was $76.25. It thus appears that in the six months period from the time of the filing of the amended complaint until the time of the verified answer to an interrogatory, the plaintiff incurred an additional expense of $4.25 for medical treatment. The pre-trial order in the federal court was lodged on March 3, 1964 and filed on April 16, 1964. The pre-trial order includes as "Plaintiff's Contentions" the claims that as a result of the accident the total general damages were $60,000, the total doctor, hospital, and medical expense was $76.25, and the net loss of wages was $5,850. It would seem that, after the passage from the time of the accident of two years, seven months, and eight days, the plaintiff and his counsel should have been in the best position to evaluate the amount of damages sustained. In this connection and without comment, I note certain judicial observations as follows: "It is a matter of common knowledge that ordinarily the amount of damages laid in the complaint is much in excess of any sum which the plaintiff hopes to receive." (Francis, J., in *Botta* v. *Brunner*, 26 N.J. 82, 138 A.2d 713, at 725 (1958)); "In negligence cases, as is well known, the amount of damages laid in the statement is ordinarily much in excess of the sum which the plaintiff expects to recover, * * *" (Mestrezat, J., in *Hollinger* v. *York Ry.*, 225 Pa. 419, 74 Atl. 344 (1909)); "It is a matter of common knowledge that ordinarily in a tort case, the damages laid in the complaint are in an amount arbitrarily chosen, [and] greatly exaggerated, * * *" (Paul, D.J., concurring in *Williams* v. *Nichols*, 266 F.2d 389, 394 (4th Cir. 1959)).

30.01.[2] The defendants availed themselves of their right to cause the controversy to be determined in the federal courts, and in view of plaintiff's failure ever to communicate notice of intent to seek more general damages than the amount specified in his original and amended complaints and in the pre-trial order, I cannot join in the imposition of a $15,000 penalty for recourse to federal jurisdiction. To uphold the award, the majority opinion, while omitting reference to the $76.25 in medical expenses, points only to evidence given by the plaintiff and his expert medical witness and indulges in certain mathematical computations. The computations spring from assumption that had it not been for the injuries treated at an expense of $76.25, the longshoreman would have continued until the age of sixty-five[3] to engage in the heavy labor of stevedoring. Moreover, it is assumed that if this work, always remaining continuously available, were not capable of performance by plaintiff, he could not seek and find equally remunerative employment suitable to his capabilities. Following his fall, Parks required no hospitalization and was idle for a period of only six weeks, other facts to which the majority makes no reference. Considerations of common sense and respect for property rights compel me to record my view that the award of $80,000 is, under the whole record, shockingly excessive. Cer-

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[2] "* * * the amount of damages alleged in the complaint * * * does fix a maximum limit, and you are not permitted to award plaintiff * * * more than that amount."

[3] Parks had been a stevedore since 1956.

tain constitutional concepts fostered our country's beginning and have nurtured its progress. These include respect by the sovereign for individual personal rights and dignities and the guarantee of reasonable security in honorably acquired fruits of free enterprise. In our grave concern for the first, we should never blind ourselves to the importance and necessity of the second. If it were true that our court should be obliged to accept, without power of review, damage awards against any claim of excessiveness or inadequacy, then I would gladly adjust to such a procedural rule. Our responsibility is otherwise, however, and it should be met by consideration of the whole record and the whole circumstances, not merely by referring to portions of testimony touched by self interest or bias. I would require a remittitur of the general damage award to an amount not exceeding that which was specified by the plaintiff as the ultimate limit of his recovery of such damage in the forum where he sought relief. I would require it, not only because the whole body of evidence does not support a general damage award above that amount, but also because the recited procedural history renders it unjust not to do so.

I now turn to the more far-reaching and alarming aspect of the majority opinion. That aspect pertains to the question which, put in the immediate framework, may be stated as follows: May the manufacturer of an article which is not inherently dangerous be justly held liable to a longshoreman who sustained

injury while loading the manufactured article aboard a vessel and as a result of using the article for a peculiar purpose not intended or anticipated by the manufacturer or known to him? The majority answers "yes", and I cannot agree. I keenly regret that our court, by the majority opinion, imposes liability to an extent beyond which any court has ever gone before. No case cited by the majority furnishes direct authority for its conclusion, and as far as I can discover, there is none which does. I believe that the majority's case authorities, upon analysis, will be seen to afford no support, even indirect, for its novel creation in the realm of torts. My Brother Browning places principal reliance upon excerpts from the works of legal scholars, but, to me, a reading of these same works reveals that the cited propositions, applicable in the context of cases involving the types of products and situations which led to the pronouncements, provide a weak and unstable foundation upon which to rest the majority's new rule.

Simpson was not the shipper of the doors. It manufactured the doors and packed them for sale to an exporter. Knowing that the exporter would ship the doors by vessel, it packaged them in a manner such as to protect them from damage, the same manner in which it had always packed similar doors for export without injury having been sustained by one participating in the transport. The bundles, marked "fine doors", were sold by the manufacturer to an exporter and delivered to the dock. The exporter arranged that Grace Line convey the doors overseas in one of its

ships, and the shipowner made a contract with an experienced stevedoring company for the loading of the ship's cargo. Without incident, the bundles were loaded until the top-most layer was sought to be placed in the square of a hatch. Since the bundles did not precisely and firmly fit within the square, the expert loaders chose to stabilize the top-most layer by placing sacks of flour between the bundles. In furtherance of this decision, the injured longshoreman superimposed upon his own "robust" frame a sack of flour weighing one hundred pounds and, as stated by the majority, "used the doors as a floor." The wrapping of the particular bundle could not withstand such weight, and the forty-two inch fall resulted. In former days, one might have supposed that the manufacturer would have a just claim for damage wrought by expert handlers upon its bundle of "fine doors". Now, we discover that the course toward liability is reversed.

The plaintiff's claim, as against the manufacturer, rests upon the fact that it was the established custom and practice of longshoremen, while in the process of loading a ship's cargo, to walk upon whatever packages or bundles may have constituted the cargo. The majority approves of charging the manufacturer with knowledge of the practice and holding it liable for failing to package its product accordingly.[4]

[4] The majority points to the testimony of one of Simpson's employees that he had been at the docks of ships, that he had seen the holds of ships, and that he had "wondered" how cargo

Implicit in the result approved by the majority is that one who packs an item for shipment is burdened by a legal duty to ascertain the customary working practices of stevedores in any port which the purchaser, shipper, or transporter might select for loading and embarkation. Let us suppose that a manufacturer packages fine glassware in Missouri and sells it to an exporter who chooses New Orleans as the place for export. If it should be the practice of New Orleans longshoremen to walk barefooted on packages being loaded as a ship's cargo, should a longshoreman who, following the practice, cuts his foot upon the contents of the crushed package recover against the manufacturer who was truly ignorant but might have learned, by inquiry, of the practice? The majority, by application of its revolutionary principle, would say "yes".

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was moved to those portions of holds which were away from the hatches overhead. To me, this testimony does not establish a scintilla of evidence from which it could properly be inferred that Simpson's employee, contrary to his denial, harbored actual knowledge of the peculiar walking habit and practice of the stevedores. One may visit a dock and see the hold of a ship without seeing a loading operation, and it is cause for wonder indeed that one's curiosity as to the manner in which packages are moved from one area of a ship's hold to another can be equated with knowledge that they are moved by walking upon them. I would concede that if the manufacturer here actually knew of the peculiar practice, then liability to the longshoreman might properly be found to rest upon him. Under the evidence, however, I cannot believe that the jury determined that the manufacturer was, before the accident, knowledgeable as to the practice. Notwithstanding absence of knowledge, it was proper, says the majority, for the jury to impose liability upon finding that the manufacturer negligently breached a duty to become knowledgeable, prior to the unprecedented accident, of the existence of the peculiar stevedoring practice. This is the conclusion with which I most strongly disagree.

I find but one case wherein the facts are closely analogous to those which meet us here. That case is *McCready* v. *United Iron & Steel Co.*, 272 F.2d 700 (10th Cir. 1959). There, the defendant was a manufacturer of steel window casements. While a casement was being placed into a building under construction, an iron worker, while shortening the outside flanges of the casement, used its crossbars as handholds and footrests. One of the crossbars did not withstand the stress, and the workman fell to his death. It was proved that in the construction of buildings, iron workers customarily and commonly ascend and descend casements by using the casements' steel crossbars as handholds and footrests; nevertheless, the court held, properly in my opinion, that the manufacturer was not liable. Said the Court of Appeals, "A manufacturer may assume that his product will be devoted to its normal use. And if it is safe when devoted to the normal use for which it was manufactured, he is not liable in damages for injury resulting from an abnormal or unusual use not reasonably anticipated." *McCready* v. *United Iron & Steel Co.*, *supra*, 272 F.2d at 703 (Citations omitted). The majority opinion critically discounts the force of *McCready*, with the comment, "We confess our inability to satisfactorily explain the apparent inconsistency in the court's evaluation of the proof." I believe myself to be easily able to explain that which is characterized by the majority as "inconsistency" in the sound opinion of *McCready*. The product was intended for use as a window, not as a

ladder. The manufacturer was not under a legal duty to investigate all customs, however universal, of construction workers who might participate in the erection of buildings where the window casements might be installed. He had no duty to follow his product through every avenue to its ultimate intended use. The principle of *McCready* is a sensible principle, soundly based upon traditional concepts of legal duty. It should control our determination here.

I also point to *Cohagan* v. *Laclede Steel Co.*, 317 S.W.2d 452 (Mo. 1958), wherein the defendant steel manufacturer had packed steel strips in bundles which were wrapped in three places with steel wire. At their destination, the bundles were unloaded by the use of a crane. On the crane's cables were hooks which were placed under the two steel wire wrappings at the ends of the bundle to be lifted. While one of the bundles was being lifted from a trailer on which it had been transported to the consignee, the wire wrapping at one end of the bundle broke. There was evidence of a practice to lift bundles by attaching a crane's cable hooks to the steel wire wrappings as there was evidence here of the custom and practice of using packages as walkways. The court held that the manufacturer was not liable to the consignee's injured workman. Missouri's Supreme Court remarked, "Thus the initial requirement of the rule [as to manufacturers' liability] is that the use being made of an article or product must be the purpose for which it was manufactured or, as stated in [McLeod v. Linde Air Prods. Co., 318 Mo. 397, 1 S.W.2d 122 (1927)],

the application being made of the thing must be for its intended use." 317 S.W.2d at 454. The court went on to emphasize that "the primary purpose of the wire binder was to hold together * * * pieces of steel in a bundle," 317 S.W.2d at 454, and I say here that the primary purpose of Simpson's wrapper, marked "fine doors," was "to hold [the doors] together," and to protect them from damage. Simpson no more intended nor anticipated that the doors would be put to use as a floor, to withstand any weight, however heavy, than did the manufacturer in *McCready* intend or anticipate that the casement would be used as a ladder or the manufacturer in *Cohagan* that the binders would be used as a lifting attachment.

Following its statement of facts, the majority begins its opinion, "Used as a floor, the bundle of doors was a trap," and then proceeds, upon that premise, to build its far-reaching result. Any manufactured article, if wrapped in a manner too fragile to withstand an unintended use to which it may be subjected by reason of peculiar practice unknown to the wrapper, may become a trap. Here, the bundle of doors may have been a trap, but if so, it was because the bundle was being subjected to a use for which it was not designed or intended or anticipated, a use arising solely from a peculiar stevedoring practice about which, says the majority, the manufacturer was obliged to learn. If the doors' wrapper were of sufficient strength to survive the weight of an ordinary man and if Simpson had, as the majority would require, made inquiry and ascertained the stevedores' practice of walking upon

packages of cargo, would the majority also have required that he anticipate that a workman would walk upon the package while carrying a hundred pound sack of flour or any other burden, of whatever weight, which might be chosen, in the instant, to pack and stabilize the packages in the square of the hatch? Would the manufacturer have the legal duty to anticipate that three or four or five longshoremen might walk or stand upon his package at the same time? Since in our case there is no evidence of stevedoring custom or practice to impose a particular weight upon packages being used as floors, the majority opinion would seem to require that the manufacturer insure that his product be packaged in anticipation of whatever use to which it may be subjected by stevedores loading it as a part of a ship's cargo. I deplore the creation and imposition of such an unprecedented legal duty.

There is no evidence to support the majority's conclusion that "Any one who stepped on it was bound to be injured, perhaps severely." The most that can be truly said is that any "robust" man, carrying a hundred pound sack of flour, "who stepped on it was bound to be injured, perhaps severely."

Now, I turn to the "authorities" upon which rests the majority's decision. It first cites *Spruill* v. *Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962), extracting from the decision one isolated statement defining "intended use." The facts of that case should not be overlooked. A tiny child died from swallowing furniture

polish marketed by the manufacturer in a container which afforded insufficient notice of the inherently dangerous properties of the product. Long established and especial principles are justly applicable in so-called products liability cases wherein the product is inherently dangerous or harmful. These principles are sound, but I cannot see that they are appropriate for application in a case wherein the product is an ordinarily harmless item such as a package of doors which cannot explode, ignite, strike, poison, or cause skin disease.

Each of the cases cited by the majority to support its decision involve easily distinguishable fact situations. The propositions for which they are cited are inapplicable in the context of the case at bar. All but two involved products with inherently dangerous properties. Of the other two, one involved a pipe-bending shoe which broke loose from a machine and injured the machine operator.[5] The shoe, although suitable for use only on machines made by the defendant, was sold unmarked and without any warning as to the danger of using the product as a replacement part on similar machines made by other companies, the use to which the product was being put at the time of injury. The second case involved a grain swather, the levers of which were tied down for packing.[6] The tension was such that when the wire holding the levers was cut, any person unpacking the machine was in danger of

[5] *Mazzi* v. *Greenlee Tool Co.*, 320 F.2d 821 (2d Cir. 1963).
[6] *Central Steel Tube Co.* v. *Herzog*, 203 F.2d 544 (8th Cir. 1953).

being struck by the lever as it sprang back to its proper position. Each of the cases cited by the majority to support its theory of recovery is charted below.[7]

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CASE	PROPOSITION CITED FOR IN MAJORITY OPINION
Spruill v. *Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962).	"The doctrine of 'intended use' is but a convenient adaptation of the basic test of "reasonable foreseeability" framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence.'"
Mazzi v. *Greenlee Tool Co.*, 320 F.2d 821 (2d Cir. 1963).	Cited as additional authority for above. And "If the jury concluded from this evidence that the manufacturer was aware of the risk, the manufacturer would be liable for its failure to exercise reasonable care to avoid the foreseeable injury."
Butler v. *L. Sonneborn Sons, Inc.*, 296 F.2d 623 (2d Cir. 1961).	Cited as additional authority for *Spruill* v. *Boyle-Midway, Inc.*, citation, *supra*. And "See also" authority for "A manufacturer who places packaged doors in the stream of commerce is charged with knowledge that they will be handled by persons engaged in commerce, and is required to discover the dangers to which the packaging might expose such persons in the normal course of their work." And "A 'long history of good fortune' will not preclude a jury finding of negligence."

All persons injured in the cited cases were either intended users, persons in the geographic zone of the intended use, or persons making necessary and clearly

PRODUCT	INJURED PARTY	BASIS OF LIABILITY
Poisonous furniture polish	child of user of furniture polish	Failure to give sufficient warning of poisonous nature of product
pipe-bending shoe which broke while in use on high speed machine	machine operator	(1) failure to warn that product was unsuitable for use on similar machines made by competitors; (2) defect in the pipe-bending shoe involved in the accident. Court stated that "there can be no recovery against a manufacturer if its product was not used for the purpose and in the manner intended." 320 F.2d at 823.
steel drum containing highly explosive liquid	person repairing steel drum with a welding torch	failure to give sufficient warning of nature of contents

foreseeable preparations for the intended ultimate use of the products. In none was the injured party putting the product to a use so unrelated and unnecessary to the ultimate intended use as was the use as a floor of a bundle of doors.

The majority repeatedly cites Noel, Manufacturer's Negligence of Design or Directions for Use of a Product, 71 Yale L.J. 816 (1962). That article directs

CASE	PROPOSITION CITED FOR IN MAJORITY OPINION
Moran v. *Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950).	"One who undertakes to manufacture a product for distribution to others is charged with the knowledge and skill of an expert in the field he voluntarily enters."
Braun v. *Roux Distrib. Co.*, 312 S.W.2d 758 (Mo. 1958).	Cited as additional authority for above.
Central Steel Tube Co. v. *Herzog*, 203 F.2d 544 (8th Cir. 1953).	"A manufacturer who places packaged doors in the stream of commerce is charged with the knowledge that they will be handled by persons engaged in commerce, and is required to discover the dangers to which packaging might expose such persons in the normal course of their work."
Land O'Lakes Creameries, Inc. v. *Hungerholt*, 319 F.2d 352 (8th Cir. 1963).	"See also" authority for statement "A manufacturer who places packaged doors in the stream of commerce is charged with knowledge that they will be handled in commerce, and is required to discover the dangers to which the packaging might expose such persons in the normal course of their work."

its attention to "cases where the principal difficulty has been that the basic design of the product is unsafe." 71 Yale L.J. at 817. Since, as the majority emphasizes in its footnote "8," "negligence in the manufacture of doors was not alleged," the use of Noel's comments as authority in our case is to take the material out of context. In any event, the comment from Noel which is quoted in the majority's footnote "2."

PRODUCT	INJURED PARTY	BASIS OF LIABILITY
tank built to store natural gas	persons in the zone of use of the tank	negligence in designing, supplying, and recommending the tank for storage of such a dangerous fuel
hair dye containing a chemical intrinsically dangerous to human life or health	user of hair dye	failure to warn of user's possible sensitivity to chemicals
lever of grain swather tied for packing so as to create great tension	person unpacking grain swather	negligence in creating hidden danger to whomever unpacked the machine and in failing to warn of the danger
fertilizer containing materials causing skin irritation	person delivering the fertilizer. Fertilizer fell from hole in bag into injured party's boot causing dermatitis	failure to warn of substance imminently dangerous no matter what the intended use was

does not support the majority's decision. In support of my position, I quote Noel from page 830 where, under the heading of "Extensive Safe Use by Defendant of the Same Design," it is written, "Besides tending to show that the design is not in fact unsafe, such evidence of harmless use tends to prove that even if a considerable risk of injury in fact was involved, the manufacturer was not unreasonable in failing to appreciate the hazard."

CASE	PROPOSITION CITED FOR IN MAJORITY OPINION
Martin v. *Bengue, Inc.*, 136 A.2d 626 (N.J. 1957).	"See also" authority for "A 'long history of good fortune' will not preclude a jury finding of negligence." And "See also" authority for "the package of doors was 'imminently' dangerous when used by longshoremen in the manner which the manufacturer had or should have anticipated."
Southern Ariz. York Refrigeration Co. v. *Bush Mfg. Co.*, 331 F.2d 1 (9th Cir. 1964).	Direct authority for statement "the package of doors was 'imminently' dangerous when used by longshoremen in the manner which the manufacturer had or should have anticipated."

In its footnote "2.," the majority cites, but does not quote, 2 Harper & James, Torts § 28.4, at 1542 (1956). I choose to quote all of the cited section, which, pertaining to the authors' title "Design, plan, specifications," read as follows:

"This does not mean that the product must be incapable of doing harm. To fulfill the very purposes for which they are made, many products must have great capacity for harm. Knives and

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PRODUCT	INJURED PARTY	BASIS OF LIABILITY
skin balm which emitted inflammable vapors	user of skin balm	failure to warn of inflammable nature of product after application
ammonia gas	owner of food spoiled by leaking gas	breach of warranty. Court said: "[T]he manufacturer of a product inherently dangerous to life and limb may be held liable on the ground of negligence, * * * * * * * * "[A] manufacturer of a product which, although not dangerous in itself to life and limb, becomes so when applied to its intended use in the usual and customary manner is liable to a person who sustains injury as a proximate result of negligence in the manufacture of such product, which injury might have been reasonably anticipated." 331 F.2d at 8-9.

axes could not cut wood if they were not also able to wound or kill a human being; dynamite must explode; automobiles must develop power and speed that will enable them to do great damage if they leave the road or strike an object; ensilage cutter must have sharp moving parts that will mangle an arm as well as a cornstalk. The duty of care does mean, on the other hand, that the manufacturer must take reasonable precautions in the light of these necessary dangerous propensities. What, if any, precautions are required is a question that will vary with the circumstances and will, as always, depend upon a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm."

The comment is obviously directed to the consideration of the manufacturer's duty in cases wherein his product is, if not inherently dangerous as in the example of dynamite, being used at the time of injury for the precise purpose of its "design," "plan," specification, and intended ultimate use. In the light of the examples given from the quoted material from Harper & James, I do not view it as significant or controlling authority here. It will also be observed that the quoted authors assume that the manufacturers possessed knowledge of the danger of their products even in ordinary and anticipated usage.

From Frumer & Friedman, Products Liability (1960), the majority cites sections from two chap-

ters.[8] These chapters are entitled, "Duty to Warn" and "Abnormal Use." I do not read the material as authority which supports the opinion of my Brothers. Manufacturers' liability has been extended in recent years because, say Frumer & Friedman, "more and more complicated products with potentiality for harm if not properly used are being sold to relatively inexperienced laymen." 1 Frumer & Friedman, Products Liability § 8.01, p. 145. None has claimed that bundles of doors are "complicated products" as discussed by Frumer & Friedman, and it could hardly be successfully urged that the plaintiff here was an "inexperienced layman" in the handling of a ship's cargo. I rely on Frumer & Friedman wherein they write, "Foreseeability must be based on the manufacturer's notice or knowledge of the danger." 1 Frumer & Friedman, Products Liability § 8.03, pp. 148-49, and, "If injury resulted from an unforeseeable use of the

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[8] Two other chapters of Frumer & Friedman are cited: "§ 5.03 MacPherson v. Buick Motor Company" [217 N.Y. 382, 111 N.E. 1050 (1916) (in which, at the time of the injury, the product, an automobile, was being put to the precise use for which it was designed and intended)]. This section lends, at most, tangential support to the majority's position. At note 22, Frumer & Friedman cite to *Central Steel Tube Co.* v. *Herzog*, discussed elsewhere in this dissent, and also to Restatement, Torts § 395, comment (c) (5) (1934): "The particulars in which reasonable care is usually necessary for protection of those whose safety depends upon the character of chattels are, * * * (5) the packing of the article so as to be safe for those who must be expected to unpack it." Here, of course, there was no danger to one who might unpack the doors (assuming the nonexistence of a working practice to use the bundle as a floor while unpacking it).

"§ 16 Manufacturer's Liability in Warranty," cited by the majority is, as it indicates at note "1.," not relevant to the instant case.

product, judgment must go for the defendant because of failure of plaintiff's proof, either as to breach of duty or proximate cause." *Id.* at § 15.01, p. 352. It is highly significant that Frumer and Friedman support their last comment by the citation of several cases, among which is included *McCready* v. *United States Iron & Steel Co., supra.* I have already emphasized that the facts of *McCready*, so very, very analogous to those of our case, should lead us to the same conclusion as that reached in the Fourth Circuit.[9]

As to Simpson, I would reverse the judgment.[10]

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[9] Beyond pointing out that the majority's casenote authority, 23 Minn. L. Rev. 628 (1939) is directed to considerations of possible danger to the ultimate intended user of a product and speaks of "reasonably safe" products and "nature and qualities" of products, I shall omit discussion of this reference. Each of the cited sections of the Restatement and also the cited material in Prosser have the same absence of relevance as the majority's authorities discussed in the text of this dissent.

[10] In his opening statement, plaintiff's attorney told the jury, in effect, that following the accident, Simpson had improved its manner of packaging doors. The majority upholds the district judge's denial of a motion for mistrial, immediately made. Perhaps the majority is correct in its view that the statement was innocuous. At the same time, it is regrettable that an experienced lawyer, even in the zeal of advocacy, would so misconduct himself. It is more regrettable that, henceforward, careful attorneys, advising manufacturers subsequent to an accident, must weigh the necessity of discouraging the taking of commendable precautionary action lest prejudice to one of their clients be done in a future trial arising from an unprecedented accident.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

EZRA PARKS, *Plaintiff,* vs. GRACE LINE, INC., a corporation, and SIMPSON TIMBER COMPANY, a corporation, *Defendants,* GRACE LINE, INC., *Third Party Plaintiff,* vs. BRADY-HAMILTON STEVEDORE CO., a corporation, *Third Party Defendant.*	Civil No. 63-156 MEMORANDUM OF DECISION

EAST, District Judge.

The plaintiff longshoreman, an employee of the third-party defendant Brady-Hamilton Stevedore Co. (Stevedore), was injured while engaged in the course of his employment aboard the vessel SANTA FLAVIA, owned by the defendant Grace Line, Inc., a corporation (Grace).

The defendant Simpson Timber Company, a corporation (Simpson), had packaged for known shipment in foreign commerce a bundle of doors, each of which doors had an opening for a window and were stacked and bundled so as to leave a hole or a well in

the bundle of doors. The stack of doors so arranged were then covered by a corrugated paper packaging material suitable for the protection of the doors in shipment.

Stevedore caused the package of doors to be brought aboard the vessel and stowed so that the packaged doors became a part of the walking floor for the longshoremen when they were engaged in stowing other cargo; and the plaintiff longshoreman, while handling cargo and walking on the packaged doors, stepped upon the corrugated paper packaging material covering the undisclosed hole or well and plunged through, causing his injury.

The issues of unseaworthines of the vessel and Grace's liability therefor; Simpson's negligence in packaging the doors and failing to warn the ship's longshoremen and its liability therefor; and plaintiff's injury and damage were submitted to the jury, resulting in a verdict in favor of the plaintiff longshoreman against the defendants in the sum of $75,000.00.

A.

Simpson now moves for a judgment in its favor notwithstanding the verdict, or, in the alternative, for a new trial or a remittitur of that part of the award in excess of $60,000.00, and, also;

B.

Simpson seeks:

1) Indemnity over on its liability to plaintiff from Grace, its codebtor under the judgment, and

2) From Stevedore in that Stevedore was actively negligent in putting aboard the vessel the package of doors which was latently dangerous to the plaintiff longshoreman, whereas Simpson's negligence, if any, in the mode of packaging or lack of warning thereon, was passive.

C.

Grace, as third-party plaintiff:

1) Joins Simpson in seeking the remittitur, and on its own part seeks:

2) Indemnity over on its liability to plaintiff longshoreman from Simpson, its codebtor on the judgment, on the grounds of the passive versus active negligence premise; and

3) Indemnity over on its liability to plaintiff longshoreman from Stevedore on the grounds of the Stevedore's breach of its implied warranty to properly and safely perform its stevedoring contract.

D.

Stevedore seeks indemnity over from Grace for its costs and attorney's fees incurred in defense of the third-party claim.

CONCLUSIONS

A.

During the course of the trial, I dealt with and ruled adversely to Simpson on all the grounds and reasons now urged for a judgment in its favor notwithstanding the verdict, or, in the alternative, a motion for a new trial, and conclude that each of said

motions is based upon untenable grounds and should be overruled.

While I believe that the verdict is more than ample, yet the award is not shocking in view of the medical testimony concerning plaintiff's injury and impairment to work at longshoring, and I cannot find that the verdict is so excessive as to be a product of prejudice, passion, or other inflamed or sympathetic attitude on the part of the jury, and the motion for the remittitur must be denied.

B.

1) Since Simpson had parted with any interest, either as an owner or shipper of the packaged doors, the vessel and Grace, her owner, owed Simpson no duty of seaworthiness, and I find that Grace played no part in the facts and circumstances surrounding Simpson's packaging of the doors, Stevedore's putting them aboard, or in the handling, placing, or stowing of the packaged doors as cargo. I conclude that Grace is a party to Simpson's negligence only through the vessel's warranty of seaworthiness to plaintiff, and if this be negligence towards plaintiff, it is passive in character. See *Isthmian Lines, Inc.* v. *Canadian Stevedoring Co.*, 216 F. Supp. 856, and its discussion of *Burrad Drydock Co., Ltd.* v. *Canadian Union Line, Ltd.* (Supreme Court, Canada); and

Therefore, Simpson has no right or remedy of indemnity over from Grace.

2) Simpson was not the owner or shipper of the packaged doors and was an utter stranger to Steve-

dore. I also find that Stevedore had no actual or reasonable opportunity to have had notice or knowledge of the existence of the latent defect or danger in the packaged doors so as to effectively intervene in the chain of causation. I conclude that Simpson has no (*sic*) or remedy of indemnity over against Stevedore. See the precedent of *Parker* v. *United States*, Civil No. 62-170 (D. Or., Kilkenny, J.).

C.

1) The question of a remittitur upon the verdict has been disposed of.

2) As found in B 1) above, Grace stands in relation to Simpson as a passive wrongdoer, if any at all, towards plaintiff, and its liability to plaintiff is based solely upon the vessel's warranty of seaworthiness as extended to her owner. Therefore, the judgment against Grace and Simpson is predicated upon different duties owed the plaintiff by Grace and Simpson, respectively, and, accordingly, under the precedents of *SS Elizabeth Bakke* v. *Columbia River Packers*, Civil No. 8988 (D. Or., Solomon, J.), *States SS Co.* v. *Howard*, 180 F. Supp. 461 (D. Or., East, J.), and *McFall* v. *Compagnia Maritime Belge* v. *Dow Chemical Co.*, 107 N.E.2d 463, 1952 A.M.C. 1860 (N.Y.), I conclude that Grace is entitled to indemnity over on its judgment liability from Simpson. See also O.R.S. 18.430.

3) I reserve conclusion on Grace's claim of indemnity over against Stevedore, awaiting final disposition of *Italia Societa* v. *Oregon Stevedoring Co.*,

376 U.S. 315, 11 L. Ed. 2d 732 (1964), outcome of indemnity over or contribution between the judgment debtors Grace and Simpson, or further order.

D.

And for like consideration, [C-3)], I reserve conclusion on Brady's claim for indemnity for attorney's fees and expense of defense.

Proctor for Grace is requested to submit proposed findings and orders in conformity with the foregoing.

DATED June 15, 1964, at Prescott, Arizona.